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No. 11139

2420

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey Corporation,
Appellant,

vs.

LESLIE O. FOWLES,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division

FILED

OCT 25 1945

PAUL P. O'BRIEN,
CLERK

No. 11139

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMERCIAL CASUALTY INSURANCE
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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OF RECORD

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In the United States District Court in and for the
Eastern District of Washington Southern Division

Civil No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
Defendant.

COMPLAINT

To the Honorable Lewis B. Schwellenbach, Judge
of Said Court:

1. This action is brought under the provisions of the Federal Declaratory Judgment Act as amended. (Sec. 274d of the Judicial Code; 28 USCA Sec. 400)

2. Plaintiff is a citizen and resident of the State of Washington.

3. The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4. There is a diversity of citizenship between the plaintiff and the defendant. That amount in

controversy herein exceeds the sum of \$3,000.00, exclusive of interest and costs.

5. On or about the 4th day of May, 1937, the defendant issued to plaintiff, then 32 years of age, at the City of Olympia, Washington, in consideration of the premium of \$10.20 and the statements contained in the application of plaintiff therefor, its policy of life, health and accident insurance No. 14 H 5110, and said policy of insurance, by virtue of renewals thereof, remained [1*] in full force and effect at all times hereinafter mentioned.

6. Said policy of insurance provided, subject to the provisions and limitations therein contained, that defendant insured plaintiff against loss of time and the expenses of hospital, nursing, medical and surgical care, resulting independently of all other causes, from accidental bodily injury, fatal or non-fatal, referred to therein as "such injury", from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability.

7. Said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability, defendant would pay for treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding

*Page numbering appearing at foot of page of original certified Transcript of Record.

fifteen consecutive weeks, provided plaintiff should be necessarily confined in a hospital, the amount expended for such hospital expenses to the extent of \$25.00 weekly.

8. At the time of making application for said policy of insurance, plaintiff's occupation was that of a Mail Carrier in the Postal Service of the United States in the City of Olympia, State of Washington, and that fact was so stated and known to the defendant. On or about 1937, plaintiff became a Commissioner Officer in the Military Service of the United States of America. In that connection, said policy of insurance provides:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the [2] premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

9. On or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while on furlough and while operating a motor vehicle for recreation in the City of Philadelphia, Commonwealth of Pennsylvania, was involved in an accidental collision between said motor vehicle and a trolley car of the Philadelphia Transportation Company, a corporation of the Commonwealth of Pennsylvania.

10. As a result of said accidental collision, plaintiff suffered compound fractures of his skull, with severe cerebral concussion, and hemorrhage into his middle ear and disturbance in the internal ear; left acromioclavicular separation; severe, multiple contusions and abrasions of his head, body, arms and legs; severe shock to his nerves and his entire nervous system; and he was otherwise injured internally, the extent of which he is now unable to state. Said injuries were and are permanent and plaintiff has been unable at all times since the date thereof to engage in either his occupation of Mail Carrier in the United States Postal Service or his duties as a Commissioned Officer of the United States Army. Plaintiff has been advised, believes, and therefore alleges that said injuries will continuously and permanently prevent him from engaging in his former occupation of Mail Carrier in the United States Postal Service, or in any other occupation requiring physical exertion on his part, and such disability has been continuous since said 14th day of April, 1943. As a result of said accident and the injuries resulting therefrom, plaintiff

was immediately thereafter, for a period of fifteen consecutive weeks, necessarily confined in hospitals.

11. An actual controversy exists between the plaintiff and the defendant. It is the position of the defendant that said policy of insurance became limited and the indemnities thereof reduced by reason of the fact that plaintiff changed his occupation from that of the Postal Service as Mail Carrier, to that of a Commissioned Officer of the United States Army, and that the latter occupation, being more hazardous, the premiums paid for said [3] policy of insurance do not purchase for plaintiff an indemnity of \$25.00 per week, but an indemnity of \$5.00 per week up to a principal sum of \$500.00 only, plus any sums plaintiff was obliged to expend in communicating with relatives, but not in excess of \$100.00.

12. It is the position of plaintiff that said policy of insurance provides an indemnity of \$25.00 per week in his favor for the period of his disability, and during the term of his natural life. It is the further position of plaintiff that said change in his occupation had no casual connection with or relation to said accident which resulted in his injuries and disability, for the reason that said accident did not occur while plaintiff was engaged in any occupation, but while he was operating a private and personally owned motor vehicle, for recreation, an act common to the lives of men without regard to occupation, over and upon the streets of the City of Philadelphia, in the Commonwealth of Pennsylvania.

13. Plaintiff duly notified defendant of said accident, of the fact that he was disabled and confined to a hospital and under medical and surgical care. The defendant has denied the claim of plaintiff and declined to pay him the indemnities provided in said policy of insurance. Plaintiff has done and performed all things by him to be done and performed under the provisions of said policy of insurance, and the defendant refuses to carry out and perform its obligations thereunder and pay the indemnities provided in said policy.

14. Said accident of April 14, 1943, which resulted in the injuries to plaintiff hereinabove described, was not occasioned by, was not the result of, or in anywise connected with the change of plaintiff's occupation from that of a Mail Carrier in the United States Postal Service to a more hazardous occupation, but said accident resulted from the driving and operation of a private and personally owned motor vehicle, for recreation, when it came into collision with and was struck by a trolley or [4] street car in the City of Philadelphia, Pennsylvania.

Wherefore, Plaintiff prays:

(a) That the Honorable Court declare that said policy of insurance was not and is not now limited, changed or the indemnities thereunder reduced by reason of the fact that plaintiff changed his occupation from that of a Mail Carrier in the Postal Service of the United States to that of a Commissioned Officer in the Military Service of the United

States, for the reason that said accident and all injuries, disability, hospital, medical, surgical and nursing expenses resulting therefrom, had no casual connection with or relation to such change in occupation, but arose out of and resulted from the operation of a motor vehicle, an act common to the lives of men without regard to occupational classification;

(b) That plaintiff have and recover judgment against the defendant for the sum of \$1,725.00, that being \$25.00 per week from the date of said accident to and including the 9th day of August, 1944, and the sum of \$375.00 to cover the period of fifteen consecutive weeks of hospitalization, and that judgment be entered herein in the total sum of \$2,100.00, and the costs of this action; and

(c) For such other and further relief as to this Honorable Court may seem just, meet and proper.

RAYMOND G. BROWN

Attorney for Plaintiff

[Endorsed]: Filed Oct. 11, 1944. [5]

[Title of Court and Cause.]

MOTION TO QUASH SUMMONS AND
SERVICE THEREOF

The defendant, Commercial Casualty Insurance Company, hereby appears specially only in the above entitled action and moves the court for an

order quashing the summons herein, on the following grounds, to-wit:

1. That the above entitled court does not have jurisdiction of the above captioned matter for the reason that the amount of the controversy as shown by the plaintiff's complaint, is less than the sum of Three Thousand Dollars (\$3,000.00). That the United States judicial code requires that the amount in controversy exceed \$3,000.00 in order to give the United States District Court jurisdiction of the action.

This motion is based upon the affidavit of William J. Madden, hereto attached.

RYAN, ASKREN & MATHEWSON
Attorneys for Defendant

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM J. MADDEN ON
MOTION TO QUASH SERVICE OF SUM-
MONS

State of Washington
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says: That he is one of the attorneys representing the defendant in its special appearance and he makes this affidavit on behalf of the said defendant as he is authorized to do. That the amount in controversy in the above cap-

tioned matter is less than Three Thousand Dollars (\$3,000.00) and that the said court does not have jurisdiction in the action.

WILLIAM J. MADDEN

Subscribed and Sworn to Before me this 31 day of October, 1944.

ETHEL M. MERRILL

Notary Public in and for the State of Washington,
residing in Seattle.

A copy of the foregoing motion to quash summons and a copy of the affidavit of William J. Madden received this 1st day of November, 1944.

RAYMOND G. BROWN

Attorney for Plaintiff

[Endorsed]: Filed Dec. 8, 1944. [6]

[Title of Court and Cause.]

AMENDED COMPLAINT

1.

This action is brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274d of the Judicial Code; 28 USCA Sec. 400).

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the

State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant. The amount in controversy herein exceeds the sum of \$3,000.00, exclusive of interest and costs, as will more fully hereinafter appear.

5.

On or about the 4th day of May, 1937, the defendant issued to plaintiff, then 32 years of age, at the City of Olympia, Washington, in consideration of the semi-annual premium of \$10.20 and the statements made in application of plaintiff therefor, its policy of life, health and accident insurance No. 14 H 5110, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof, and said policy of insurance, by virtue of renewals thereof, remained in full force and effect at all times hereinafter mentioned.

6.

Said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for

such loss of time for the period of such disability; that said policy further provided for an identification indemnity not exceeding one hundred dollars.

7.

Said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability necessitated treatment and residence in a hospital, defendant would pay for such treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding fifteen consecutive weeks, provided plaintiff should be necessarily confined in a hospital, the amount for hospital expense to the extent of \$25.00 weekly.

8.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington; that at said time, plaintiff was, and had been for a number of years, a member of the Washington National Guard, which fact was stated and known to defendant; that the Washington National Guard was mobilized in 1941 and later made a part of the army of the United States.

9.

That said policy of insurance provides in part as follows:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

10.

On or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was involved in an accidental collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident, of the fact [8] that he was disabled and con-

fined to a hospital and under medical and surgical care. The defendant has denied the claim of plaintiff and declined to pay him the indemnities provided in said policy of insurance. Plaintiff has done and performed all things by him to be done and performed under the provisions of said policy of insurance, and the defendant refuses to carry out and perform its obligations thereunder and pay the indemnities provided in said policy.

12.

As a result of said accidental collision, plaintiff suffered compound fractures of his skull, with severe cerebral concussion, and hemorrhage into his middle ear and disturbances in the internal ear left acromioclavicular separation; severe, multiple contusions and abrasions of his head, body, arms and legs; severe shock to his nerves and his entire nervous system; and he was otherwise injured internally, the extent of which he is now unable to state; that said injuries have caused plaintiff to be continuously and totally disabled since said April 14, 1943, and has prevented plaintiff from performing any and every duty of his occupation or of any occupation; that plaintiff has been advised, believes and therefore alleges that said injuries will continuously and permanently prevent him from engaging in any duties pertaining to his occupation or any occupation; that as a result of said accident and the injuries resulting therefrom, plaintiff was immediately thereafter, for a period of fifteen consecutive weeks, necessarily confined in hospitals.

13.

That at the time of said accident of April 14, 1943, plaintiff had a life expectancy of 29.62 years and the benefits accrued and to accrue in the future, to plaintiff from defendant, will approximate the sum of \$35,400.

14.

That an actual controversy and dispute exists between the plaintiff and defendant as to the meaning and construction of said policy of insurance, and the plaintiff's present and future rights are effected; the defendant asserts that the plaintiff has changed his occupation to one more [9] hazardous but the plaintiff maintains and claims he is entitled to the full indemnities and benefits set forth in said policy as to total disability, hospitalization and identification indemnity; that his activities at the time of said injury had no causal connection with his occupation nor any occupation; and that at said time he was engaged solely in recreation and was operating a personally owned motor vehicle for his own enjoyment, an act common to the lives of men without regard to occupation.

That said policy of insurance itself is in direct controversy in this proceeding in that either the full indemnities therein provided and enumerated are effective, or, according to defendant, an entirely different set of provisions are controlling, so limiting in scope and value as to almost nullify any benefits.

That the benefits now accrued, amounting to the approximate sum of \$2575, are only a part of plain-

tiff's right of recovery; plaintiff's right to future benefits should be preserved and protected, and the value of that right exceeds \$3000.

Wherefore, plaintiff prays judgment may be entered by this Court declaring that at the time plaintiff was injured, the full indemnity provisions set out and enumerated herein and in said policy of insurance were in full force and effect and that said provisions were not in any way changed, limited nor reduced; that the plaintiff be declared to be totally disabled within the meaning of the terms of said policy; that plaintiff be declared to be entitled to full indemnity for hospitalization and full indemnity as set forth in said policy for total disability for the period said disability prevents him from performing any duty pertaining to his occupation; and granting plaintiff such other relief as may seem meet, just and equitable, together with the costs of this action.

RAYMOND G. BROWN

JUNE FOWLES

Attorneys for Plaintiff [10]

State of Washington

County of Yakima—ss.

Leslie O. Fowles, being first duly sworn, on oath, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing petition and knows the contents thereof, and believes the same to be true.

LESLIE O. FOWLES

Subscribed and sworn to before me this 15 day
of January, 1945.

[Seal] LIONEL PUGMIRE

Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed Jan. 16, 1945.

EXHIBIT "A"

LOYALTY GROUP

This Policy Provides Indemnity for Loss of Life,
Limbs, Sight, Speech, Hearing or Time Due
to Accidental Bodily Injuries to the Extent
Herein Provided.

Policy No. 14H 5110

STAR

ACCIDENT POLICY

Commercial Casualty
Strength Service
Insurance Company
Newark, New Jersey

Issued to Leslie O. Fowles Agent
Newton C. Bader
General Insurance
206 Security Bank Bldg
Olympia Wash
The Man Without a Hat [11]

Exhibit "A"—(Continued)

COPY OF THE APPLICATION FOR THIS
POLICY

1. What is your full name? Leslie O. Fowles
2. What was your age last Birthday? 32 Date of Birth? June 30, 1904 Place Olympia, (State or Country Wash.)
3. Height? 5 ft. 10 in. Weight 157 lbs. Sex? Male Color? White
4. Where do you reside? 135 Foote St. Olympia County of Thurston State of Washington
5. Are you member or firm or employee? United State Postal Service (State name or firm and business engaged in)
Located at? U. S. Federal Bldg. Street, Town of Olympia State of Washington
6. What is your occupation? Postal Service-Mail Carrier (City) (a foot) (State fully duties performed, position and nature of business)
7. To whom shall policy be payable in case of death?
Names Mrs. June C. Fowles, (Relationship) Wife if living, if not to father Mr. Omega B. Fowles, address Olympia, Washington.
8. Do your average weekly earnings exceed the aggregate single weekly indemnity payable under this policy and all other similar policies carried by you? Yes.

Exhibit "A"—(Continued)

9. What accident or health insurance have you in this or other companies or associations? 10.00 per week for accident & sickness in Members Beneficial Ass'n (U S Federal Employees) until \$500.00 is used up.

10. Have you ever received indemnity for any injury or illness? No. What Company? None.

11. Have you ever been declined or postponed for life, accident or health insurance? No What Company? None

12. Have you ever made application for life, accident or health insurance upon which you have not been notified of the action thereon? No

13. Has any life, accident or health policy issued to you been cancelled or has any renewal thereof been refused by this or any other company or association? No

14. Have you in contemplation any special journey or hazardous undertaking? No

15. Do you ever engage in motorcycling or aeronautics? No

16. Have any of your relatives ever been insane or had tuberculosis? Yes. My mother passed away from tuberculosis in 1912 from quick consumption

17. Are your habits temperate? Yes

18. Are you maimed or deformed?—

19. Is your sight or hearing impaired? No [12]

20. Have you ever had a hernia or worn a truss? No

21. Have you ever had any of the following:

Exhibit "A"—(Continued)

Epilepsy? No. Syphilis? No. Vertigo or Dizziness? No

Diabetes: No. Tuberculosis? No. Mental Disorder? No

Disease of Brain or Nervous System? No

Disease of Heart? No

Disease of Tonsils, Nose or Throat? No

Rheumatism? No

22. Have you within the past five years had medical or surgical advice or treatment? Yes. If so state when and what, duration, and name of attending Physician April 5, 1937 cut on index finger of right hand 2 days Dr. H. D. Lillibridge (Duration or Ailment) (Name of Attending Physician)

23. Have you ever had or been advised to have, a surgical operation? No

24. Have you been exposed during the last ten days to any contagious or infectious disease? No

25. Do you agree that the falsity of any answer in this application for a policy shall bar the right to recover thereunder if such answer is made with intent to deceive or materially effect either the acceptance of the risk or the hazard assumed by the Company? Yes

Policy applied for this 4th day of May, 1937.

Signature of Applicant

LESLIE O. FOWLES

Exhibit "A"—(Continued)

Good Faith Strength

This Policy Provides Indemnity for Loss of Life,
Limbs, Sight, Speech, Hearing or Time Due
to Accidental Bodily Injuries to the Extent
Herein Provided.

Commercial Casualty
Strength Service
Insurance Company
Newark, New Jersey

(Hereinafter called the Company)

Single Principal Sum 1000.00

Single Weekly Indemnity 25.00

In Consideration of the premium of Ten and
20/100 Dollars, and of the statements in the appli-
cation for this policy, copy of which is endorsed
hereon and made a part hereof, and subject to
all the provisions and limitations hereinafter con-
tained and endorsed hereon,

Does Hereby Insure Leslie C. Fowles (Herein-
after called the Insured) of Olympia, State of
Washington, whose occupation is 135 Foote Street
for the term of Six (6) months from the 5th day
of May, 1937, beginning and ending at 12 o'clock
noon, Standard Time, at the place of countersig-
nature hereof, against loss resulting directly and
independently of all other causes, [13] from acci-
dental bodily injury, fatal or non-fatal, being here-

Exhibit "A"—(Continued)

inafter referred to as "such injury," as specified in the following schedules, respectively:

Death, Dismemberment, Loss of Sight, Speech or
Hearing.

Schedule 1.

(a) If such injury shall continuously and wholly disable the Insured any time within two weeks from date of accident from performing any and every duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under Specific Losses, the Company will pay the sum set opposite such loss:

(b) Or, if within six months from the date of accident, irrespective of total disability, such injury shall directly result as aforesaid in one of the losses specified under Specific Losses, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided, further, that not more than one of the amounts (the greater) named under Specific Losses shall be payable for injuries resulting from one accident.

Specific Losses

Loss of Life: The Principal Sum

Both Hands by actual separation at or above wrists: The Principal Sum

Both feet by actual separation at or above ankles:
The Principal Sum

Exhibit "A"—(Continued)

One Hand and One Foot by actual separation at or above wrist and ankle; The Principal Sum

Entire Sight of Both Eyes if irrecoverably lost:
The Principal Sum

Entire Sight of One Eye, if irrecoverably lost, and One Hand at or above the wrist by severance:
The Principal Sum

Entire Sight of One Eye, if irrecoverably lost, and One Foot at or above the ankle by severance:
The Principal Sum

Speech and Hearing, if entire and irrecoverable:
The Principal Sum

One Leg by actual separation at or above knee:
Two-thirds the Principal Sum

One Arm by actual separation at or above elbow:
Two-Thirds the Principal Sum

One Hand by actual separation at or above wrist:
One-Half the Principal Sum

One Foot by actual separation at or above ankle:
One-Half the Principal Sum

Speech or Hearing if entire and irrecoverable:
One-Half the Principal Sum [14]

Entire Sight of One Eye is irrecoverably lost:
One-Third the Principal Sum

Permanent Stiff or Rigid Elbow and Knee Joints: One-Sixth the Principal Sum

Thumb and Index Finger of Either Hand by actual separation at or above metacarpo-phalangeal joints: One-sixth the Principal Sum

Permanent Stiff or Rigid Elbow or Knee Joint:
One-Twelfth the Principal Sum

Exhibit "A"—(Continued)

Or, in the event of loss of both hands, or of both feet, or of the sight of both eyes, covered and defined as above, if the Insured shall so elect in writing, the Company will pay in lieu of the specific indemnity enumerated in this schedule, weekly indemnity at the rate prescribed in Schedule II for total disability so long as the Insured shall live.

Indemnity for Total or Partial Disability.

Schedule II.

Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of the accident cause continuous total disability, and prevent the Insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident Indemnity above specified, for the period of such disability.

Partial Loss of Time. Or, if such injury shall, commencing any time within two weeks from the date of accident or immediately following total disability, prevent the Insured from performing one or more material duties pertaining to his occupation, the Company will pay one-half of the above specified weekly Accident Indemnity for the period of such continuous partial disability, but not to exceed a period of fifty-two consecutive weeks. Weekly indemnity will not be payable under the provisions of Schedule I except as therein stated.

Exhibit "A"—(Continued)

Sunstroke, Freezing, Hydrophobia or Asphyxiation.
Schedule III.

(a) Sunstroke, Freezing, Hydrophobia or Asphyxiation, due solely to such injury, shall be covered by this Policy.

Blood Poisoning.

(b) Blood Poisoning resulting directly from such injury shall be covered by this Policy.

Cas A. & H. 5643—25M—11.30—7275

.....
Service Loyalty Group Security [15]

Optional Indemnities

Schedule IV.

Or, if such injury is one set forth in this schedule, and the Insured so elects in writing within twenty days from the date of the accident, he may take, in lieu of all other indemnity, except as provided under Schedule VII, the amount specified for such injury in this schedule, provided that not more than one such indemnity shall be payable as the result of any one accident; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is \$25.00; if such weekly indemnity is greater or less than \$25.00, then the amount to be paid shall be increased or reduced proportionately.

Exhibit "A"—(Continued)

FOR LOSS

Of one or more Entire Fingers	\$150
Of one or more Entire Toes	200

FOR COMPLETE DISLOCATION

Of the Shoulder	\$100
Of the Elbow	100
Of the Wrist	125
Of the Hip	300
Of the Knee	150
Of two or more Bones of Foot (not toes).....	150
Of the Ankle	150
Of two or more Toes	50
Of two or more Fingers	50

FOR COMPLETE FRACTURE

Of the Skull, both Tables	\$325
Of the lower Jaw	80
Of the Collar Bone	160
Of the Pelvis	250
Of the Thigh	300
Of the Leg (Tibia and Fibula).....	200
Of the Leg (one bone).....	100
Of the Knee Cap	200
Of the Arm between Elbow and Shoulder.....	160
Of the Arm between Wrist and Elbow (both bones)	160
Of the Arm between Wrist and Elbow (one bone)....	100
Of two or more Ribs	100
Of the Foot (two or more bones—not toes).....	125
Of the Hand (two or more bones—not fingers).....	125
Of two or more Toes	100
Of two or more Fingers	100
Of the Scapula (Shoulder Blade).....	100

Double Indemnities

Schedule V.

The amounts payable in Schedule I, II and IV shall be doubled if such injury is sustained by the Insured,

Exhibit "A"—(Continued)

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof or while boarding or alighting therefrom) provided by a common carrier for passenger service.

(2) While in a passenger elevator (excluding elevators in mines).

(3) In consequence of the destruction, by fire, of a building while the insured is therein, (excluding firemen on duty).

(4) In consequence of being struck by lightning.

(5) In consequence of the collapse of the walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

Non-Disabling Injury Indemnity

Schedule VI.

Or, if such injury shall not disable the Insured or entitle him to any other indemnity under this policy, but shall require immediate medical or surgical [16] attention, the Company will reimburse him for the cost of such treatment in an amount not to exceed the single Weekly Accident Indemnity for one week, provided that the attending physician's or surgeon's receipt is filed with the Company within ninety days from the date of loss.

Surgical Operations.

Schedule VII.

If such injury to the Insured shall, within Ninety

Exhibit "A"—(Continued)

days from the date of the accident necessitate a surgical operation named in this schedule, the Company will pay, in addition to any other indemnity herein provided, the sum named for such operation in the Schedule of Surgical Operations; provided that not more than one such operation indemnity shall be payable as the result of any one cause of disability, and such operation indemnity may be subject to the election of the Insured; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is \$25.00; if such weekly indemnity is greater or less than \$25.00 then the amounts to be paid shall be increased or reduced proportionately. Reimbursement will not be made for any operation which is necessitated by a disease or bodily condition contracted or existing prior to the issue of this policy.

AMPUTATION OF—

Foot, Hand or Forearm	\$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10
Toes, one or more entire	10

REDUCTION OF DISLOCATION OF—

Shoulder, Elbow, Hip, Knee or ankle	\$ 25
Wrist or Low Jaw	15
Fingers, one or more	10

EXCISION OF—

Shoulder, Hip or Knee Joint	\$100
Elbow, Wrist or Ankle Joint	50
Eye	50

Exhibit “A”—(Continued)

REDUCTION OF FRACTURE OF—

Lower Jaw, Collar Bone, or Shoulder Blade.....	\$ 25
Breast Bone or Nose	10
Rib or Ribs	10
Rib or Ribs (resection)	50
Upper Arm	25
Forearm, one or both bones.....	25
Wrist or Hand	15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of.....	50
Coccyx	10
Thigh	75
Knee Cap (open operation)	50
Knee Cap (Fixation)	25
Leg Bone (One)	25
Leg Bone (Both)	50
Foot, two or more bones, not toes	15
Toes, one or more	10

LAPAROTOMY (Opening of the abdominal cavity for an operation on any organ contained therein).....	\$100
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INCISION FOR—

Synovitis (inflammation of the lining membrane of a joint)	\$ 25
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HYDROPHOBIA, Pasteur Treatment	50
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GUNSHOT WOUNDS (not necessitating amputation or Laparotomy)	25
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SKULL TREPHINING for fracture	100
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SUTURING WOUNDS	5
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Hospital Expenses

Schedule VIII.

If such injury to the Insured shall entitle him to weekly Indemnity under the terms of this policy and

Exhibit "A"—(Continued)

within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to [17] the indemnity otherwise provided for a period not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount for hospital expenses but not exceeding per week the amount payable hereunder as single weekly indemnity.

Graduate Nurse Fees

Schedule IX.

If such injury to the insured shall entitle him to weekly indemnity for total disability under the terms of this policy and within ninety days from the date of commencement of said disability, the Insured shall need and receive the care and attendance of a nurse who is a graduate of a licensed hospital, and provided no claim is made for hospital expenses, the Company will pay to the Insured the amount actually and necessarily expended by him to secure such nurse's care and attendance, for a period not exceeding fifteen consecutive weeks but not exceeding per week the amount payable hereunder as single weekly indemnity.

Aerial Passenger Injuries

Schedule X.

The Company will pay indemnity (Single Indemnity only) for any loss specified in the policy result-

Exhibit "A"—(Continued)

ing from injuries caused by any of the hazards of air commerce while the Insured is riding as a fare-paying passenger in a licensed commercial aircraft operated on a published schedule and provided by an incorporated common carrier for passenger service and while operated by a licensed transport pilot and flying on a regular air route between two definitely established airports.

Identification Indemnity

Schedule XI.

If such injury shall render the Insured physically unable to communicate with relatives or friends, the Company will, upon receipt of a telegram or other message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses, not exceeding One Hundred Dollars (in addition to any other indemnity herein provided), necessary to put the Insured in communication with and in care of relatives or friends.

Standard Provisions:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the [18] Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is

Exhibit "A"—(Continued)

doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having supervision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the Company is liable.

Changes in Policy. 2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

Reinstatement of Policy. 3. If default be made

Exhibit "A"—(Continued)

in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

Time of Notice of Claim. 4. Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury. In event of accidental death immediate notice thereof must be given to the company. [19]

Sufficiency of Notice. 5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at Newark, N. J., or to any authorized agent of the Company, with particulars sufficient to identify the insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possibly.

Forms for Proof of Loss. 6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen day after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the

Exhibit "A"—(Continued)

occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination. 8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities. 9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

Weekly Indemnity Payable in Installments. 10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each four weeks during the continuance of the period for which the Company [20] is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

To Whom Indemnities Payable. 11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to

Exhibit "A"—(Continued)

the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Cancellation By Insured. 12. If the insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled By Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last

Exhibit "A"—(Continued)

address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

Additional Provisions:

Injuries Not Covered. 21. This policy does not cover any accidental bodily injury caused or contributed to, directly or indirectly, by sickness or disease, or by ptomaines or bacterial infections (except [21] pyogenic infections which shall occur with and through an accidental cut or wound), or by war or any act of war; nor disappearance; nor loss resulting from any means or act which, if used, done or self-inflicted by the insured while in possession of all mental faculties, would be deemed intentional; nor loss suffered while, or resulting from, riding or being in or on any aerial device or conveyance except as provided in Schedule X.

Specific and Permanent Losses. 22. No payment shall be made for more than one loss under Schedule I. Any payment made under Schedule I shall terminate this policy, which must be surrendered.

Copy of Application Part of Contract. 23. The copy of the application endorsed hereon is hereby made a part of this contract. No provision of the charter, constitution or by-laws of the Company not included herein shall avoid the policy or be used in evidence in any legal proceedings hereunder.

Renewal of Policy. 24. This policy may be renewed, subject to all of its provisions, from term to

Exhibit "A"—(Continued)

term with the consent of the Company and by the payment of the premium in advance.

In Witness Whereof, the Commercial Casualty Insurance Company has caused this policy to be signed by its President, and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative.

(Signature Not Legible)

President.

WM. R. GRIFFIN,

Secretary.

Dated and Countersigned at Olympia, Washington, the 5th day of May 1937.

By.....

Authorized Representative.

[Endorsed]: Filed Jan. 16, 1945. [22]

[Title of Court and Cause.]

MOTION TO QUASH AMENDED COMPLAINT
AND SERVICE THEREOF

The defendant, Commercial Casualty Insurance Company, hereby appears specially only in the above entitled action, by its attorneys, Ryan, Askren & Mathewson, and without waiving its prior motion to quash he summons and service hereof in this case on the ground that this court has no jurisdiction of the action, moves the court for an order quashing

the amended complaint and the service thereof, on the following grounds, to-wit:

1. That it appears from Paragraph 12 of the said amended complaint and from the prayer therein that the plaintiff is praying for redress for anticipatory breach of a contract and for indemnity for injuries which he has not yet suffered. That it has been consistently held in this court that payments due on an insurance policy by virtue of disability cannot be recovered in advance.

This motion is based upon the affidavit of William J. Madden, hereto attached.

RYAN, ASKREW &
MATHEWSON,

Attorneys for Defendant.

State of Washington,
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says: That he is one of the attorneys representing the defendant in its special appearance and he makes this affidavit on behalf of the said defendant as he is authorized to do. That the suit in question is based upon a certain accident policy issued by the defendant wherein the defendant agrees to pay to the insured certain weekly indemnities during such time as the plaintiff is wholly or partially incapacitated by virtue of certain injuries specified in the said policy. That it plainly appears from the said amended complaint that the plaintiff is herein attempting to raise the amount in suit to [23] the jurisdictional requirements of this court by pleading anticipatory damages which have

not yet occurred and by suing in advance for indemnity payments. The Federal court, as well as the state courts, with some uniformity held that a plaintiff in such cases cannot bring an action on such a policy for injuries which have not as yet occurred, and cannot plead a disability which has not yet been incurred.

WILLIAM J. MADDEN

Subscribed and sworn to before me this 6 day of February, 1945.

(Seal) ETHEL M. MERRILL
Notary Public in and for the State of Washington,
residing at Seattle.

Copy of the foregoing motion and affidavit received this 7th day of February, 1945.

JUNE FOWLES,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 13, 1945.

[Title of Court and Cause.]

OPINION OF THE COURT

Schwellenbach, District Judge

This is an action under the Federal Declaratory Judgment Act (28 U.S.C.A. 400) in which plaintiff seeks to require defendant to pay hospital expenses and weekly disability allowances under the provisions of a policy of insurance issued by the defendant to him in 1937. Plaintiff alleges that, while the

policy was in force, he became totally and permanently disabled as a result of an accident occurring on April 14, 1943. He alleges that he has a life expectancy of 29.62 years and that, under the terms of the policy, he will be entitled during his life to receive benefits amounting to \$35,400. He alleges that, up to the date of the filing of his amended complaint, benefits accrued to the extent of \$2,575. He further alleges that the defendant refuses to pay the benefits provided in the policy for the reason that it contends that prior to the accident he had changed his occupation and that, under the provisions of the policy, the liability of the defendant is limited to such portion of indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits fixed by the company for fore hazardous occupation, which plaintiff alleges would be so limited in scope and value as almost to nullify any benefits. He alleges that his rights to future benefits which he seeks to preserve and protect by this action exceed the sum of \$3,000 in value. To the complaint, the defendant has interposed a demurrer and a motion to quash. By these it seeks to raise the jurisdictional questions to whether the amount in controversy exceeds \$3,000. Plaintiff objects to the consideration of this jurisdictional question under the demurrer and motion contending that they do not properly reach the question. (28 U.S.C. A. 723 C-7 (c) and 126). Regardless of the tactical ineptness on defendant's part, the question is here and must be decided. *Kavourgias v. Nicholaou Company Limited*, 9th Cir., decided March 12, 1945.

Defendant insists that consideration of this jurisdictional question must be limited exclusively to the allegations of the original [25] complaint. That contention is without merit. Federal Rules of Civil Procedure 15 C (28 U.S.C.A. 723 C, 15 (c)). *Culver v. Bell & Loffland*, 146 F. 2d 29, 31; *Alderman v. Elgin J. & E. Ry. Co.*, 125 F. 2d 971, 973; *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F. 2d 561, 562; *Carr v. Fife*, 156 U. S. 494. While it is true that, in determining jurisdiction, the decision must be based upon the facts that existed at the time of the commencement of the original action and it is true that a plaintiff cannot commence an entirely different action by an amended complaint, a plaintiff does have a right to insert new allegations of facts which existed at the time of the filing of the original complaint and they will relate back to the original filing. The only important factual amendment in the amended complaint here, as compared with the original, is the inclusion of the paragraph referring to plaintiff's life expectancy.

The problem which defendant presents on the question of jurisdiction is an extremely perplexing and vexatious one. There is a sharp conflict of opinion between the Circuit Courts of Appeals which have passed on it. The question posed is whether, in a declaratory judgment action, when the indemnities already accrued are less than \$3,000, the court has jurisdiction when it is alleged that, taking into consideration the insured's life expectancy and accepting the allegations as to permanent and total disa-

bility, the value of the insured's rights will, if he lives out and is totally disabled during a sufficient period of his expectancy, amount to more than \$3000.

It is well settled that, in a straight action to recover disability benefits, the jurisdictional amount must be measured upon the basis of the indemnities already accrued. *Mutual Life Insurance Co. of New York v. Wright*, 276 U. S. 602; *Equitable Life Assur. Society v. Wilson*, 81 F. 2d 657; *Wright v. Mutual Life Ins. Co. of New York*, 19 F. 2d 117. This is true even though the collateral effect of the judgment in such actions may be to establish the right of the insured to recover sums far in excess of the jurisdictional amount. *Elgin v. Marshall*, 106 U. S. 578; *Cromwell v. County of Sac*, 94 U. S. 351. See, also, *Healey v. Ratta*, 292 U. S. 263. The [26] Declaratory Judgment Act does not enlarge the jurisdiction of the Federal Courts nor alter the character of the controversies which are the subject of judicial power under the Constitution. *Southern Pacific Co. v. McAdoo*, 82 F. 8d 121; *West Pub. Co. v. Colgan*, 138 F. 2d 320. But when the validity of the whole policy is in issue and the policy value exceeds the jurisdictional amount, the court has jurisdiction in a declaratory judgment action even though the accrued liability for disability payments is less than \$3,000. *Bell v. Philadelphia Life Ins. Co.* 78 F. 2d 332; *Pacific Mut. Life Ins. Co. of California v. Parker*, 71 F. 2d 872; *Ginsburg v. Pacific Mut. Life Ins. of California*, 69 F. 2d 97. In that aspect, obligations it may be compelled to pay in the future are not merely contingent and enter into the amount in dis-

pute. In determining what they are, the life expectancy of the insured may be considered. *Thompson v. Thompson*, 226 U. S. 551; *Brotherhood of Locomotive Firemen & Enginemen v. Pinkston*, 293 U. S. 96; *New York Life Ins. Co. v. Swift*, 38 F. 2d 175; *Jensen v. New York Life Ins. Co.* 50 F. 2d 512

The Court's jurisdiction in cases in which the basic facts substantially correspond to those alleged here has been sustained in *Ballard v. Mutual Life Ins. Co. of N. Y.*, 5th Cir., 109 F. 2d 388; *Franzen v. E. I DuPont DeNemours & Co.*, 3d Cir., 146 F. 2d 837; *Columbian Nat. Life Ins. Company v. Goldberg*, 6th Cir., 138 F. 2d 192. See, also, *Davis v. American Foundry Equipment Co.*, 7th Cir., 94 F. 2d 441. It has been denied in *Mutual Life Ins. Co. of New York v. Moyle*, 4th Cir., 116 F. 2d 434; *Mutual Life Ins. Co. v. Temple*, 56 F. Supp. 737; *Edelman v. Travelers Ins. Co. of Hartford, Conn.*, 21 F. Supp. 209.

Unfortunately this is not a question of which disposition can be made through the simple mathematical process of comparing the number of decisions. In *Mutual Life Ins. Co. v. Moyle*, *supra*, Judge Parker wrote an opinion which can not be ignored even in the face of the weight of authority. No one can deny the correctness of his statement that litigants "may not be [27] permitted, under the guise of seeking declaratory judgments, to drag into federal courts the litigation of claims over which, because involving less than the jurisdictional amount, it was never intended that the federal courts should have jurisdiction." There is much logic in his statement:

“A declaratory judgment can be had, however, only with respect to a justiciable controversy; and the justiciable controversy here, as we have seen, extends only to the accrued disability benefits, as the conditions entitling insured to such benefits may change at any time.” I can see no logic, however, in distinguishing between cases in which the entire policy is attacked and that in which only the question of the right to the benefits is raised. If the amount of disability benefits is too uncertain in one instance, it should be too uncertain in the other. “The conditions entitling insured to such benefits may change at any time,” regardless of whether the attack is on the whole contract or just a part of it. In thus holding, the Moyle case runs counter to the Supreme Court’s statement in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 242, which reads as follows: “On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability

benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

“That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial [28] cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.”

On this phase of the case, I feel myself bound by the recent decision of the Ninth Circuit Court of Appeals in *American General Ins. Co. v. Booze*, 146 F. 2d, 329, 331; That was an action for a declaratory judgment by an insurance company which asked the court to determine whether or not it was required to defend an action which had been commenced against its assured. The amount of liability to which the insurance company might be subjected was undetermined. It might be less or much more than \$3,000. In that case, the entire policy was not attacked. The insurance company admitted that its contract was in full force and effect. It alleged that the individual for whose death claim was made was, at the time of his death, covered by the Workmen's Compensation Act of California and that, therefore, his heirs were not entitled to recover from the plaintiff's assured and, therefore, asked the court so to interpret its contract or to relieve it of the obligation to defend

the action against its assured or to pay a judgment which might be rendered against him. The issue was raised that because there was no certainty that the amount of that judgment would exceed \$3,000, therefore the amount in controversy did not exceed \$3,000. Without discussion, the court disposed of the contention as being without merit.

It is true that the policy in the Booze case obligated the company to pay up to \$10,000. That, however, was only the limit of its obligation. It was just the ceiling above which its contract could not go. That is a distinction which few courts have made but which must be made. It is usually only upon death or the happening of a certain event (such as the loss of an eye or a limb) that the company "contracts" to pay a certain amount. The principal sum named to be paid in the event of the occurrence of other events or the existence of certain conditions is the limit of liability. For example, in the policy involved in this case, there [29] are two equally important provisions for indemnity. The first is the "Single Principal Sum \$1,000." The other is the "Single Weekly Indemnity \$25." This plaintiff's claimed right under the policy is to have paid to him the sum of \$25. per week as long as he lives if he is permanently and totally disabled. That right has been placed in doubt by the Company's claim that he lost it because he changed his occupation. The amount in controversy is the value of that which it is sought to be declared free of doubt. It cannot be claimed with any logic that a difference may exist simply

because of the manner in which that doubt has been raised. There is an actual controversy admitting of relief. The jurisdictional question turns on the value of the right which is controverted. The Ninth Circuit Court of Appeals definitely recognized this principle when, in *Equitable Life Assur. Co. v. Wilson*, *supra*, p. 660, it underlined the Supreme Court's language as follows: "The Supreme Court draws the distinction between the two in the following language: 'This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds \$3,000, the District Court has jurisdiction.' 293 U. S. 96, 99, 100, 55 S. Ct. 1, 2, 79, L. Ed. 219."

Defendants demurrer, which I have considered as a motion to dismiss, must be overruled and its motion to quash denied.

L. B. SCHWELLENBACH

United States District Judge

April 2, 1945

[Endorsed]: Filed April 2, 1945.

[Title of Court and Cause.]

ORDER OVERRULING DEMURRER AND
DENYING MOTION TO QUASH

This matter having regularly come before the Court on March 5, 1945, for hearing of defendant's

demurrer and motion to quash, plaintiff and defendant appearing by counsel, and the Court being fully advised [30] in the premises,

It is hereby Ordered that defendant's demurrer, considered herein as a motion to dismiss, is overruled, and defendant's motion to quash is denied.

Dated this 11 day of April, 1945.

L. B. SCHWELLENBACH

United States District Judge.

[Endorsed]: Filed Apr. 11, 1945. [31]

[Title of Court and Cause.]

ANSWER

Comes now the defendant by its attorneys, Ryan, Askren & Mathewson, and for answer to the amended complaint of the plaintiff, admits, denies and alleges as follows:

I.

Answering Paragraphs I., II., and III. of the plaintiff's complaint the defendant admits the allegations therein contained.

II.

Answering Paragraph IV. of the plaintiff's complaint, the defendant admits that there is a diversity of citizenship but denies that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

Answering Paragraph V. of the plaintiff's complaint, the defendant admits that the policy in question was issued at or about the time and place alleged.

IV.

Answering Paragraph VI. of the plaintiff's complaint, [32] the defendant alleges that the policy in question contains the whole contract entered into between the parties and said policy states the liability, if any, which the defendant undertook in the event of injury to the plaintiff.

V.

Answering Paragraph VII. of the plaintiff's complaint, the defendant admits the allegations therein contained.

VI.

Answering Paragraph VIII. of the plaintiff's complaint, the defendant admits that at the time the plaintiff made application for said policy of insurance, the plaintiff's occupation was that of mail carrier. The defendant alleges that it has no information enabling it to form a belief as to the plaintiff's membership in the Washington State National Guard, and the defendant denies that the plaintiff's membership in the Washington State National Guard was ever called to its attention. In said connection the defendant alleges that the application for the said party contains no reference to membership of the plaintiff in the said Washington State National Guard.

VII.

Answering Paragraph IX. of the plaintiff's complaint, the defendant admits that the quoted provision is contained in the said policy but alleges that provision I. (one) relating to change of occupation is not set forth fully in plaintiff's complaint.

VIII.

Answering Paragraph X. of the plaintiff's complaint, the defendant admits that the plaintiff was injured but denies that the injury took place at a time when the plaintiff was engaged in recreation.

IX.

Answering Paragraph XI. of the plaintiff's complaint, the defendant admits that the plaintiff has notified the defendant of the said accident but denies each and every other allegation in said paragraph contained.

X.

Answering Paragraphs XII. and XIII. of the plaintiff's complaint, the defendant denies the allegations therein contained.

XI.

Answering Paragraph XIV. of the plaintiff's complaint, the defendant admits that there is a dispute as to the amount due the plaintiff at this time under the terms of the policy in question but denies each and every other allegation in said paragraph contained.

For a First, Affirmative and Further Defense the Defendant Alleges as Follows:

I.

That the policy of insurance mentioned in the Plaintiff's complaint was issued by the defendant on or about the 4th day of May, 1937, based upon a written application submitted to the company, which application was made a part of the policy of insurance issued to the plaintiff. That semi-annually from May 5, 1937, the plaintiff paid a renewal premium in the sum of \$10.20 and the defendant issued to the insured a renewal receipt continuing the said policy in force for a term of six months from the previous expiration date. The last renewal premium received by the defendant continued the said policy until the 5th day of May, 1943. At no time did the insured or anyone on his behalf ever pay or tender to the defendant or to its account any sum whatsoever other than said semi-annual premium of \$10.20 hereinbefore alleged. [34]

II.

The occupation of the plaintiff was listed in both the said application for insurance and the said policy of insurance as "postal service—mail carrier (city) (on foot)". Some time prior to the time of April 1943, the plaintiff changed his occupation from that of postal service mail carrier to that of an officer in the United States Army on active duty. At all times from prior to the month of April 1943, the said last named occupation was and is classified by the defendant as more hazardous than the occupation of mail carrier in the postal service and was classified by the defendant for

rating purposes as "Class K", and the annual premium rate applicable thereto would have been far in excess of \$10.20 semi-annually, had the defendant company accepted such a risk, that at no time did the plaintiff or anyone in his behalf notify the defendant of the said plaintiff's change of occupation.

III.

That on or about September 15, 1932, the manual of the defendant, containing the classification of risks of various occupations for insurance purposes was filed with the Insurance Commissioner of the State of Washington, and at all times thereafter was and is on file with said Insurance Commissioner. Said manual of risks provides in part as follows, to wit:

"Occupation, Exposure or Hazard

Postal Service—Mail Carrier (city) (on foot) Class "B"

"Commissioned officers and enlisted men Army or Navy, on active military or naval service anywhere in the world during war, insurrection, invasion or punitive expeditions. The term enlisted men includes all men below the rank of Commissioned officers (not insurable) Class "K"

That the plaintiff has filed with the Insurance Commissioner of the State of Washington, a copy of the form of [35] said insurance policy issued to the insured, and at all times thereafter said copy of said form was and is on file with said

insurance commissioner and was and is in full force and effect for use within said State.

That said manual of risks hereinabove referred to provides that an insured in the "B" classification may be insured in the principal sum up to \$10,000.00 and for a weekly indemnity not to exceed \$50.00. That an insured in Class "K" may be insured up to a principal sum of \$500.00 and for a weekly indemnity not to exceed \$5.00. That the said manual provides that in the event of a change of an insured's occupation to one more hazardous than the occupation the insured was originally written in, then in pro rating any claim, the limits referred to above will be strictly adhered to.

IV.

That on or about the 14th day of April, 1943, the plaintiff was involved in an accident and as a result of the injury sustained was confined to the Hahnemann Hospital for a period of five (5) weeks and that he was thereafter transferred to an army hospital where treatment was made without any charge to him.

V.

The defendant asserts and contends that because of the change of occupation, aforesaid, it is obliged to pay to the plaintiff on account of the accident hereinbefore described a sum not in excess of (\$5.00) Five Dollars per week for the period during which the plaintiff was confined to Hahnemann Hospital plus the sum not in excess of Five Dollars

(\$5.00) per week during the period which the plaintiff was permanently disabled from the injury up to the limit specified in the policy, plus [36] any sum which the plaintiff was obliged to expend in communicating with his friends and family, if such expense shall not exceed One Hundred Dollars (\$100.00) as set forth in Schedule XI. of the policy herein referred to.

VI.

That the defendant has at all times been ready and willing to pay to the plaintiff the amount which is due him under the terms of the policy in question and that said plaintiff has refused to accept the said amounts which have been tendered to him by the defendant company.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays that judgment may be entered setting forth the rights of the plaintiff against the defendant as governed by the contract of insurance as amended by the plaintiff's change of occupation and that the defendant be awarded its costs and disbursements herein expended.

RYAN, ASKREN & MATHEWSON
Attorneys for Defendant [37]

State of Washington
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says:

That he is an attorney at law, associated with the firm of Ryan, Askren & Mathewson, attorneys

of record for the defendant herein, that he has read the foregoing answer, knows the contents thereof and believes the same to be true, that he makes this verification on behalf of the defendant corporation as he is authorized to do.

WILLIAM J. MADDEN

Subscribed and Sworn to Before Me This 26 Day of April, 1945.

[Seal]

ETHEL M. MERRILL

Notary Public in and for the State of Washington,
residing at Seattle.

Copy received April 27, 1945

JUNE FOWLES

Atty. for Plaintiff

[Endorsed]: Filed May 3, 1945. [38]

[Title of Court and Cause.]

REPLY

Comes now the plaintiff and replying to the answer of defendant to plaintiff's amended complaint admits, denies and alleges:

Replying to paragraph IV, denies each and every allegation therein contained.

Replying to the first, affirmative and further answer and defense:

I.

Referring to paragraph I of said first affirmative defense, plaintiff admits that the policy of in-

insurance mentioned in plaintiff's complaint was issued by the defendant on or about the 4th day of May, 1937, and that semiannually from said date the plaintiff paid a renewal premium in the sum of \$10.20 and the defendant issued to the insured a renewal receipt continuing the said policy in force for a term of six months from the previous expiration date. The last renewal premium received by the defendant continued the said policy until the 5th day of May, 1943; and said plaintiff denies each and every other allegation therein contained.

II.

Referring to paragraph II of said first affirmative defense, plaintiff admits that the occupation of the plaintiff was listed in both the said application for insurance and the said policy of insurance as "postal service—mail carrier (city) (on foot)," and plaintiff alleges that as a member of the Washington State National Guard he was mobilized with said guard on or about February 3, 1941; and plaintiff denies each and every other allegation in said paragraph contained.

III.

Referring to paragraph 3, of said first affirmative defense, plaintiff denies any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph.

IV.

Referring to paragraph 4 of said first affirmative defense, plaintiff admits that on or about the

14th day of April, 1943, he [39] was injured in an accident and confined in Hahnemann Hospital and thereafter removed to an army hospital; and plaintiff denies each and every other allegation in said paragraph contained.

V.

Referring to paragraph V of said first affirmative defense, plaintiff denies each and every allegation therein contained.

VI.

Referring to paragraph VI of said first affirmative defense, plaintiff denies each and every allegation therein contained.

Wherefore, plaintiff prays judgment against the defendant as asked in the amended complaint.

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

Leslie O. Fowles, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing reply; knows the contents therefor; and believes the same to be true.

LESLIE O. FOWLES.

Subscribed and sworn to before me this 3rd day
of May, 1945.

(Seal) LIONEL PUGMIRE

Notary Public in and for the State of Washington,
residing at Yakima.

Copy received May 3, 1945.

RYAN, ASKREN &
MATHEWSON,

W. W. ASKREN,
Attorneys for Defendant.

[Endorsed]: Filed May 7, 1945. [40]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a Corporation,

Defendant.

COURT REPORTER'S TRANSCRIPT OF
TESTIMONY

Be It Remembered that the above entitled and
numbered cause came on for trial before the Hon.
L. B. Schwellenbach, Judge, without a jury, at the
hour of 10:00 a. m., June 15, 1945, at the court room
of said court in the Federal Building at Yakima,
Washington; the plaintiff appearing in person and
by his attorneys C. W. Halverson and June Fowles,
and the defendant appearing by its attorneys Ryan,
Askren & Mathewson (by Mr. Askren and Mr. Mad-
den);

Whereupon the following proceedings were had
and testimony given, to-wit:

The Court: Are the parties ready?

Mr. Halverson: The plaintiff is ready. I think
no doubt your Honor is familiar with the pleadings
in this case.

The Court: I am very familiar with it. You do

not need to make a statement unless there is some stipulation.

Mr. Halverson: We may be able to stipulate as far as the question of total disability is concerned, that it is hereby stipulated by and between the parties, through their respective [43] attorneys, that the plaintiff, Leslie O. Fowles, sustained injuries in an accident, causing continuous total disability from the date of the accident to the present time. The date of the accident is April 14, 1943.

Mr. Askren: We stipulate to that.

Mr. Halverson: There will be no question as to the total disability during this period of time. I think it might also be stipulated—I am not sure whether this is necessary or not—that the jury may be waived in this case, and both parties consent to try the case before Your Honor.

The Court: Yes. You say total disability to date.

Mr. Halverson: To the present time.

The Court: Is there a question as to the permanency of the injury?

Mr. Halverson: The policy does not use the term “permanent disability.” I think we are all agreed that we will not enter into this stipulation limiting the total disability to this particular time. The question was whether or not the Court, of course, could adjudge anything as to the future in regard to this particular disability, but I think without in anyway limiting the term of the existence of this litigation that it has continued and is now in effect,

and how long it will continue remains to be seen in the future.

Mr. Askren: That is right. [44]

Mr. Halverson: I will have the policy marked at this time.

Mr. Askren: No objection.

Mr. Halverson: I offer the policy in evidence, if Your Honor please. There is no objection.

The Court: You say you have no objection to it?

Mr. Askren: No objection.

The Court: It may be admitted.

(Insurance Policy admitted in evidence as plaintiff's exhibit "A".)

[Printer's Note]: Plaintiff's Exhibit "A" set out in full at page 17.

LESLIE O. FOWLES,

plaintiff, called as a witness in his own behalf, first duly sworn, testified as follows:

Mr. Askren: I wonder if before we start on the testimony I might make a short statement.

The Court: Yes.

Mr. Askren: We have raised no question as to the total, continuous disability of the plaintiff up to the present time. Our defense is that the policy provides if there is a change of occupation, the amount he may recover is that covered by the schedule of risks filed with the Insurance Commissioner.

There is also another issue on the question of the plaintiff's expense, as to the hospital expense when

(Testimony of Leslie O. Fowles.)

he was in a government hospital, and had no expense of his own, whether that is recoverable, or whether he can recover only for the hospital expense which he was required to pay, and that is the [45] issue from our standpoint.

Mr. Halverson: With that in mind, I had better make a short statement of our position in respect to that, which will be that as far as this question of the reduction of indemnity is concerned under the policy, on the grounds of alleged changed occupation, it will be our position, first, that there has been no filing of the schedule of risks with the State Insurance Commissioner of the State of Washington, which entitles the company to require the holders of this particular Star accident policy, as it is termed, "14-H"—there has been no classification of risks filed with reference to that policy which would require us to take a lesser return than that established in the policy, and, secondly, that there has been no change of occupation.

With reference to the hospital expense our evidence will show that Mr. Fowles was in the Hahne-mann hospital at Philadelphia; that he was there, as I recall, for practically five weeks, and that he has incurred hospital bills of \$394.60, nurses' bills in the sum of \$360.00, and doctors' bills of \$650.00. I will state to Your Honor that those bills are charged against Mr. Fowles. Whether the Army is going to pay them or not we do not know. They haven't paid them, but they are carried as a liability against him.

(Testimony of Leslie O. Fowles.)

The Court: A private hospital?

Mr. Halverson: Yes. [46]

Direct Examination

By Mr. Halverson:

Q. Your name is Leslie O. Fowles?

A. It is.

Q. You are the plaintiff in this action?

A. I am.

Q. What is your age?

A. Forty-one the coming June 30th.

Q. Did you take out an accident policy in the Commercial Casualty Insurance Company?

A. I did.

Q. I hand you here plaintiff's exhibit "A", and ask you to state whether or not that is the policy you obtained?

A. That is the policy.

Q. How did you come to obtain this policy—were you solicited with reference to this policy?

A. Yes, sir.

Mr. Askren: Just a minute. There is no issue on that. We admit the policy is in full force and effect, and is at the present time, and how he got the policy or who was instrumental in his getting the policy is immaterial.

The Court: I notice in reading the memorandum that they contend that the agent for the company knew he was a member of the National Guard at the time. I do not know whether that is proper to be introduced or not, but if that [47] is the purpose

(Testimony of Leslie O. Fowles.)

for which it is being introduced, it is material. Whether it is competent evidence, I do not know.

Mr. Askren: I think it would be material if we were refusing to pay the policy because he was a member of the National Guard. Then to show he was in the National Guard might have some effect on it, but we have not refused to pay because he was a member of the National Guard. We are offering the amount provided for to a man in the Army or Navy, and the fact the agent may have known it would be immaterial, as long as there is no refusal to pay because of any National Guard service. If this man was in the National Guard and got hurt and we said, "You are relegated to a lesser amount because you were in the National Guard" it would be material, but we haven't refused to pay on that ground at all.

The Court: The objection is overruled.

Mr. Askren: Exception.

The Court: You do not need to take an exception. The statute gives you one.

Q. Will you state the name of the agent through whom this policy was procured?

A. Mr. Newton C. Bader.

Q. Where does he reside?

A. At Olympia, Washington. [48]

Q. And the premiums that you paid on this policy were paid to what party?

A. To Mr. Bader.

Mr. Halverson: It is our position the question of a change of occupation, if any, is a matter of

(Testimony of Leslie O. Fowles.)

defense, and the burden of proof is upon the insurance company, which is asserting a change of occupation. I do not want to go into this matter out of order particularly.

Mr. Askren: It does not make any difference. If you do not prove it by him I will ask him the questions in regard to his change of occupation.

The Court: You get into this court, Mr. Halverson, on the theory they were refusing to pay your policy by reason of a change of occupation. That opens the door, and that being true, I think you will have to go ahead and prove it.

Mr. Halverson: All right.

Q. Mr. Fowles, at the time you took out this policy, this exhibit "A", were you a member of the Washington National Guard?

A. I was.

Q. And what was your occupation at the time—where were you employed at the time this policy was taken out?

A. As a mail carrier in the Olympia post office.

Q. How long did you continue your employment with the post office? [49]

A. Up to the time I was inducted, or approximately eighteen years.

Q. In other words, about what time were you mobilized into the army of the United States?

A. February 3, 1941.

Q. Now at the time you took out this policy were you at that time a member of the Washington National Guard? A. I was.

(Testimony of Leslie O. Fowles.)

Q. And were you or were you not well acquainted with the agent Newton C. Bader?

A. Yes, sir; I had known him quite a number of years.

Q. Had you seen him when you were in the National Guard? A. Yes, sir; quite often.

Q. Was Mr. Bader——

Mr. Askren: Your Honor overruled my objection as to this line of questions, but since there was never any issue on that, I am willing to admit as far as this is concerned that the agent who wrote the policy knew he was a member of the National Guard.

Mr. Halverson: And he knew that at the time the policy was issued?

Mr. Askren: Yes.

Q. What commission did you hold in the Washington National Guard, Mr. Fowles?

A. I was a captain. [50]

Q. Now was the Washington National Guard mobilized into the Army of the United States?

A. It was. It was mobilized into the Army of the United States.

Q. And you say that that date was February 3, 1941?

A. Yes, sir; that is right.

Q. You were a captain at that time?

A. I was a captain.

Q. Did you have any choice in the matter of whether you wished to enter the Army of the United States? A. No, sir.

(Testimony of Leslie O. Fowles.)

Mr. Askren: I think that is immaterial.

The Court: I think it is too, but I will let him answer, as long as we have no jury here.

Q. Now how long after you were mobilized into the Army of the United States did you continue in the service?

A. I was discharged January 3, 1945, for disability.

Q. January 3, 1945, you received your discharge?

A. As a commissioned officer.

Q. For physical disability?

A. Yes, sir.

Q. Where were you residing at the time the accident occurred?

A. My home was at Collingswood, New Jersey.

Q. On the date of the accident, which as I recall was April 14, 1943, were you on duty in the Army?

A. No, sir; I was on furlough. [51]

Q. When did your furlough begin and when did it end?

A. My furlough began on April 11, 1943, and was to run for ten days.

Q. What were you doing on the particular day the accident occurred?

A. At that particular time I was returning to my home in New Jersey at Collingswood.

Q. Where had you been on that particular day?

A. I had taken my wife down to the train at the Philadelphia depot, and was driving back home.

Q. Was there anyone in the car with you at the time?

(Testimony of Leslie O. Fowles.)

A. No one except a small Chow puppy.

Q. You were returning to your home?

A. Yes, sir.

Q. For what purpose?

A. I wanted to rest. I had nothing else in mind but just to take it easy.

Q. How long had it been since you had had a furlough prior to that time?

Mr. Askren: Just a minute, Your Honor. That is immaterial.

The Court: I will sustain the objection.

Q. Now had you received any further commissions after you went into the Army of the United States?

A. Yes, sir; I had received two. [52]

Q. What were they?

A. Major and Lieutenant Colonel.

Q. At the time you were mobilized or shortly prior to the time you were mobilized, did you obtain a leave of absence from the post office at Olympia?

A. Yes, sir; I did.

Q. Prior to that time had you made certain payments to the retirement fund as an employee of the post office?

A. Yes, sir; I did. I made payments monthly.

Q. And you say you had worked about eighteen years up to that time?

A. Yes, sir.

Mr. Askren: I object to this also. It makes no difference whether he later intends to return to that occupation or not, and I object to this as being immaterial.

(Testimony of Leslie O. Fowles.)

The Court: I will let him answer. That is what the argument will be about.

Mr. Askren: That is the only reason I wanted to make the objection, so you would not think I was letting it go in without objection.

The Court: I will overrule the objection on the theory that will be argued later.

Q. During that time had you made any payments to a retirement fund?

A. Yes, sir; I had. [53]

Q. How long had you made those payments to the post office?

A. I made them every month during the time I worked there. They were taken out automatically.

Q. During the time you were mobilized into the Army did you withdraw any of those payments?

A. No, sir; I did not.

Q. Now, Mr. Fowles, at the time you went into the Army on February 3, 1941, did you expect to follow the Army as an occupation?

A. No, sir.

Q. Was it your intention at that time to return to your previous employment?

A. Yes, sir. It was.

Q. And was that your intention when you received your discharge for physical disability from the Army?

A. Yes, sir.

Q. Have you been able to do any work?

A. No, sir.

Q. From the time of the accident down to the present date?

(Testimony of Leslie O. Fowles.)

A. That is right; I have not.

Mr. Halverson: There is no question being raised but what this accident happened on the date alleged?

Mr. Askren: No.

Q. Now approximately since the date of this accident how much time have you spent in the hospital? [54]

A. Well, I would say around eighteen months.

Q. Did you incur certain hospital expense at the Hahnemann Hospital at Philadelphia?

Y. Yes, sir; I did.

Q. Do you recall the amount of your hospital bill there?

A. No, sir; I do not recall except what you read this morning that it was approximately \$400.00. I knew that, and that one doctor was \$250.00 and another \$150.00, and a couple of other amounts.

Q. You had a number of specialists and doctors?

A. Yes, sir. Specialists.

Q. And you also had nurses there?

A. Yes, sir; \$355.00 or \$360.00, I believe.

Q. Have those items been paid to your knowledge?

A. To my knowledge they have not been paid.

Q. And the charge was made against you by the Hahnemann Hospital?

A. Yes; it was charged against me.

Q. Now have you received any payment of any kind from the defendant in this case under this policy in question?

A. I have received no payments.

(Testimony of Leslie O. Fowles.)

Mr. Askren: There is no issue on that, Your Honor.

Mr. Halverson: You may examine.

Cross Examination

By Mr. Askren: [55]

Q. Mr. Fowles, as I understand it, you were employed by the post office at the time you took out your application for insurance.

A. Yes, sir.

Q. And your occupation at that time was clearly stated in the policy as a mail carrier on foot?

A. Yes, sir.

Q. And that was your occupation at that time?

A. Yes, sir.

Q. On February 3, 1941, you were mobilized into the Army of the United States?

A. Yes, sir.

Q. Did you leave Olympia then?

A. I went to Fort Lewis.

Q. From Fort Lewis where did you go?

A. We traveled around the countryside and ended up at Camp California.

Q. From the third of February when you went into the Army of the United States until the present time you have never done any work at any time as a mail carrier?

A. No, sir.

Q. You say you took a leave of absence and intended to come back at the time the war was over?

A. Yes, sir.

(Testimony of Leslie O. Fowles.)

Q. When you were on furlough you were free to do whatever you [56] might want to do, to rest and recuperate. When was your furlough up? The day after the accident your furlough expired?

A. That is termed "leave", and that was up——

The Court: That is a very important distinction. An officer gets a leave and the enlisted men get furloughs.

A. That is right, Your Honor. I am glad you know that much about the Army.

Q. At the time the accident occurred how much longer did your leave give you?

A. It occurred on the 14th, and my leave would have been up on the 21st, and I would have had seven days.

Q. And on the 21st you were going back to your duties in the Army? A. Yes, sir.

Q. And you expected to stay at those duties in the Army, barring an accident that might cause you to be disabled probably until the war was over or until some new situation might arise so it would be proper for you to suggest leaving the Army?

A. I expected to stay there as long as the Government kept me.

Q. You were at the Hahnemann Hospital how long?

A. Approximately five weeks.

Q. Approximately five weeks at the Hahnemann Hospital? A. Yes, sir. [57]

Q. After you were at the Hahnemann Hospital you were then taken to a government hospital?

(Testimony of Leslie O. Fowles.)

A. Yes, sir.

Q. And in that hospital you did not have any hospital expense? A. Yes, sir; I did.

Q. What were the hospital expenses in the government hospital?

A. Any laundry that I might have, plus my food—subsistence, in other words.

Q. Did you not as a government officer have an allowance for subsistence for food?

A. We had to pay for it.

The Court: You had an allowance?

A. Yes, sir.

Q. (Mr. Askren): You received an allowance, but you had to pay for it?

A. We received an allowance always.

Q. Did you not have an allowance while you were in the hospital? A. Yes, sir.

Q. Did the Government pay you while you were at Collingswood, did you not get your pay during that time? A. Yes, sir.

Q. Did you not get your subsistence?

A. Yes, sir.

Q. And you did not have any more laundry during that time than [58] you would have when you were on duty?

A. About the same.

Q. Now did you have any nurses at the government hospital you paid for? A. No, sir.

Q. The only nurses that you had that you say were charged up to you was during the five weeks you were at the Hahnemann Hospital?

(Testimony of Leslie O. Fowles.)

A. Yes, sir.

Q. After you were injured and after you were discharged from the Army of the United States you received an allowance because of your discharge for——

Mr. Halverson: We object to that.

Mr. Askren: Let me finish asking the question.

The Court: Let him finish the question.

Q. When you were discharged from the Army because of being unfit for further service because of this accident you had received, did you receive from the Government a monthly pay, or at least some compensation for the injury you received as a United States Army officer?

Mr. Halverson: I object as being immaterial and irrelevant.

The Court: The objection is sustained.

Mr. Askren: The only purpose of the question was to show that the man was receiving pay after having had the [59] injury in the service of the United States, and therefore he could not have been a mail carrier and function as a United States Army officer at the same time. That is all.

Redirect Examination

By Mr. Halverson:

Q. Judge Askren has asked you if you expected to return to your military duties after the expiration of your leave. You had no choice in the matter, did you?

A. I had no choice. I automatically returned.

(Testimony of Leslie O. Fowles.)

Q. You had no choice as to the length of time you would stay in the service up until such time as you received a discharge, did you?

A. No, sir; no choice.

Mr. Halverson: That is all.

(Witness excused.)

Mr. Halverson: I would like to read into the record the deposition of Newton C. Bader.

The Court: Is it necessary? Judge Askren has admitted their agent knew that he was in the National Guard. Is there anything in addition to that?

Mr. Halverson: There is a letter we want to introduce in evidence.

Mr. Askren: Before counsel takes the time to read the deposition to get to the letter, let me suggest there is no question asked of Mr. Bader in the deposition except as [60] to whether or not a letter had been received, which had to do with the clarification of the policy. In other words, something said by a vice-president in regard to the policy long after the policy was written. It is elementary that nobody can change the policy, and the statute of this state requires that the contract of insurance itself governs the rights of the parties, and there is no allegation in the complaint of any kind, shape or description that after the policy was written that by a rider or otherwise anything was done which changed the terms of the policy. This is speaking of a letter which Mrs. Fowles says she does not know whom it was written to, or——

Mr. Halverson: I am not speaking of that letter. I am speaking of the letter from Mr. Bader to Mr. Fowles with reference to this policy, at which time they were notified that Mr. Fowles had entered the Army of the United States, and asking whether he could retain this policy, and in answer to that letter—the letter which I want to offer and which is identified in the deposition—the letter states they think he should keep it. It goes to the question of the construction of the policy and whether or not there were any classifications of risk which they are now contending they applied to this policy. We claim there was no such classification of risk properly filed that applied to this policy, and I think that this letter is competent [61] evidence to show that that was likewise the position of the company, that as long as he was in the Army of the United States and in the territorial limits of the United States he should keep the policy, and payments were made on the policy in the way of premiums which were not questioned and which were received by the company.

The Court: Go ahead, and I will pass on that.

Mr. Halverson: I will read this deposition then. I will ask to have the deposition published.

Mr. Askren: Practically everything in this deposition—I gave notice I would make objection on legal grounds, and that all objections could be made at the time of the trial, but I made objections during the taking of the deposition, and I think it should be read by question and answer so I may object.

The Court: You can sit up here and read the answers and Mr. Askren can read the questions and make the objects as he wants to. The deposition may be published.

Mr. Askren: I will omit the formal parts.

DEPOSITION OF NEWTON C. BADER,

a witness called on behalf of the Plaintiff, June 2, 1945, was then read by counsel, as follows, to-wit:

“Direct Examination

By Mrs. Fowles:

Q. Mr. Bader, will you please state your name and residence?

A. My name is Newton C. Bader, an insurance broker living in the city of Olympia. [62]

Q. Concerning your insurance broking, what companies do you represent?

A. I have the Commercial Casualty Insurance Company, the London and Lancashire Indemnity Company, Equitable Life and several others.

Q. You represent several others, do you?

A. Do you want the names of all of them. Yes, I do.

Q. Well, we will not go into that. What is your relation to the companies?

A. I am an insurance agent, represent them as agent, just like anyone else.

Q. General agent?

A. I don't believe I am called a general agent.

(Deposition of Newton C. Bader.)

I am a regular agent for my various casualty, fire and life companies."

Mr. Askren: The question whether or not he was a general agent or whether he was not I think is wholly unimportant. I presume your honor will want this in to see about the letter, and because of that I am raising no objection.

"Q. Are you the only one that is here for those various companies?

A. No, some of these companies that I represent have other agent in this town. A majority of the companies I represent, I am the only agent for them here.

Q. The Commercial Casualty Company, are you the only agent [63] here for that?

A. I don't know.

Q. Do you know of any other agent?

A. There used to be another agent, but whether there is another agent now, I don't know. The reason I hesitate is that I don't know.

Q. Do you solicit insurance?

A. That is my business. I solicit insurance, that is my business. I have done that and am still doing that.

Q. What further duties do you have, do you settle claims?

A. I settle some claims, yes.

Q. Do you do anything further with the policies, do you assist the claimant in any way.

A. Assist the claimants of the companies just as any other insurance agent would do. I am no

(Deposition of Newton C. Bader.)

different than any other insurance agent. They all do the things that I do.

Q. How long have you represented the Commercial Casualty Company?

A. To the best of my knowledge, about eighteen or twenty years; eighteen years, at least.

Q. What is your territory?

A. Anywhere in the state of Washington.

Q. You don't have any special territory?

A. I couldn't answer that, I don't know. I have a license for the state of Washington which entitles me to write insurance [64] for that company anywhere in the state of Washington.

Q. You have a general agency, then. Are you permitted to appoint sub-agents?

A. No, I have no such authority. In fact, I wouldn't want to.

Q. Do you know the plaintiff in this action, Leslie O. Fowles?

A. I have known Les for many, many years.

Q. About how many years?

A. I would say about twenty-three years.

Q. Did you solicit and take his application for an accident policy in the Commercial Casualty Company? A. I did.

Q. About when was this?

A. About fourteen or fifteen years ago, to the best of my knowledge. I don't recall exactly, because I haven't looked it up, but it is quite a number of years ago.

Q. Did you know the plaintiff very well?

(Deposition of Newton C. Bader.)

A. I knew Les quite well, yes.

Q. Are you an ex-service man?

A. I am.

Q. Are you a member of the Legion?

A. I certainly am. Have been ever since I came to Olympia.

Q. At one time had you held any office in the Legion?

A. Yes. I am Past Commander in the American Legion here.

Q. Did the American Legion have a building that they owned?"

"Mr. Askren: Well, Mrs. Fowles, I will have to reserve objection to that at the time of trial. I would like to suggest that that is so far afield from anything that occurs to me, it [65] is just taking up time."

Mr. Askren: I think so. I should like to raise the objection now.

Mr. Halverson: It is our position on that that this is leading up to his knowledge of the activities of Mr. Fowles when he was in the National Guard.

The Court: Assuming that for the present, I will overrule the objection.

"A. What is the question, again?

Q. Did the American Legion own a building?

A. Yes, we had the building that is now occupied by the Ice Arena.

Q. Was the Ice Arena occupied by an organization, was there an organization that occupied it?

A. The National Guard.

(Deposition of Newton C. Bader.)

Q. Did the American Legion ever meet there, did they have their office there?

A. They had their meetings there, and the National Guard met there.

Q. You, then, came in contact with the National Guard? A. Yes.

Q. Did you see the plaintiff down there attending National Guard meetings?

A. I certainly did.

Mr. Askren: I object to all of this as immaterial and irrelevant, not having any bearing on the issues in the case." [66]

The Court: With your admission your agent knew he was in the National Guard at the time he took the policy, I see no reason for putting any of this in down to line 29.

"Q. What did he give you as his occupation?

A. As a mail carrier for the city of Olympia. Of course, I saw him on the street every day.

Q. That was his occupation, and he was also a member of the National Guard?

A. He was a member of the National Guard, yes.

Q. Did you advise the company to that effect, that he was a member of the National Guard?

A. If I did, I don't recall. To tell you that I did, I don't know—I don't recall.

Q. Do you remember telling Mrs. Fowles that you advised the company, when I saw you about a week or two ago?

A. I think I mentioned something like that, to the best of my knowledge. Just how I mentioned

(Deposition of Newton C. Bader.)

it to the company, that he was a member of the National Guard.

Q. Did you mail the premium notices, the notices of premiums, to the plaintiff Leslie Fowles?"

Mr. Askren: All of this has to do with something that is not an issue in the case. There is no claim the premiums were not paid and no claim it was not received, and I would like to suggest to Your Honor there is not any of this that [67] is material, or is about a letter that was written by somebody. There is no allegation in the complaint or anywhere in the pleadings that the policy has been changed or that it was decreased or increased in the slightest degree, and I think all of this is immaterial.

The Court: You can skip through page 6.

Mr. Halverson: The only thing we desire to establish there, if the Court please, is that this man was actually handling the collection of these premiums for the company. It was not a question of remitting the premiums directly to the company, but they were paid to Mr. Bader, and this goes to the question of agency.

The Court: Is there any dispute about his being the agent?

Mr. Askren: There is no question about that. Whether they were sent to the agent or to the company would not make any difference. Even if the agent wrote anything it would not be material. The agent would not have the right to do it, and if there was a claim he had such a right it would have to be

(Deposition of Newton C. Bader.)

alleged as a ground for recovering something different than the policy provided for.

The Court: Go to line 4 on page 7: "When you wrote this policy, do you remember any of the statements you made at that time as to your relations with the company?"

Mr. Askren: I object to that. [68]

The Court: The statement by an agent to somebody he is an agent, or the nature of his agency, is not admissible. The Question: "Do you remember any statements you made at that time as to your relations with the company?" I think that objection is well taken.

Mr. Halverson: As I understand the rule after there is an agency established then the statements made by the agent go to the question of the scope of his authority. We have some evidence to that particular question.

The Court: He testified to it, but you cannot get testimony of statements that an agent made and create the agency by the statements he made.

Mr. Halverson: I am not attempting to do that, Your Honor. I think this is material only from the standpoint of establishing maybe the scope of the agent's authority, because the company has admitted this agency, and now the question is what authority that particular agent had.

The Court: I will sustain the objection to the two questions on page 7.

Mr. Askren: I believe the next question is on page 8, line 11:

(Deposition of Newton C. Bader.)

“Q. Do you remember stating that you settled all claims for this company and that the plaintiff need not worry about collecting for any accident, that you handled all matters for the company, that they left that to you? [69]

A. I don't recall making such a broad statement as that.

Q. Did you have any difficulty in delivering the policy? Was it accepted as soon as you brought it to the plaintiff?”

Mr. Askren: That is along the same line.

The Court: They admit the policy. I will sustain the objection to that.

Mr. Halverson: The only basis for that was we were trying to lay the ground, or the foundation, for introduction of a rider which we claim was issued. We made a demand upon them to produce it, but I don't know whether they have been able to find that or not.

Mr. Askren: We are now reaching the crux of it. He now suggests that he did have something that would be equivalent to a rider. There was never any allegation there was a rider, and as far as the company was concerned there was no rider, and he cannot come in on a deposition and attempt to bring out something that might have been equivalent to a rider without alleging it.

Mr. Halverson: We will not pursue that. It was a letter, and I think the notice to produce refers to it at a letter.

(Deposition of Newton C. Bader.)

The Court: We will get to that when we get to it. I will sustain the objection to the question, and we will go to page 9, lines 2 and 4.

“Q. Did you have any difficulty in getting the plaintiff to [70] accept the policy as issued?”

The Court: I sustained the objection to that. Line 10.

“Q. According to the policy, it was issued May 5th. A. What year was that?

Q. 1937. Do you remember, after thinking carefully, whether the policy was accepted immediately as issued when you brought it to the plaintiff? Do you remember any conversation regarding the terms and wording of the policy?”

Mr. Askren: While the answer does not hurt us, the conversation had between an insurance agent writing the policy and the man to whom the policy is delivered, no agent could have the right or the authority to make any statements that are not contained in the policy, as far as the question of indemnity is concerned, which is the question in issue in this case, and since there is no allegation in the complaint of that kind the question is an improper one.

The Court: I will sustain the objection.

“Q. Why did you take several months to deliver it?”

Mr. Askren: I object on the same ground.

The Court: The objection is sustained.

“Q. Do you remember the plaintiff refusing to accept the policy as it was?”

(Deposition of Newton C. Bader.)

Mr. Askren: I object to that.

The Court: The objection is sustained. [71]

Mr. Halverson: We are not raising any question on that.

“Q. Do you remember saying that you would write to the company for a clarification of the policy?”

Mr. Askren: We object to that as being immaterial.

The Court: The objection is sustained.

“Q. Do you remember the rider, the letter from Mr. Sullivan clarifying the terms of the policy? Do you remember delivering such a letter to the plaintiff?”

Mr. Askren: We object to that on the ground that is not the best evidence, and also there is no issue in the case on that. If there was a complaint as to a rider it should have been set out, and we should have had a chance to meet it.

Mr. Halverson: This letter we are referring to, Your Honor, is a letter that was issued prior to the time the letter we have been talking about was written, and the question on this particular letter that I am referring to and that is referred to in the deposition is a letter that frankly we do not have. We remember it, and we were endeavoring to establish a foundation to introduce secondary evidence as to the contents of that letter, and certainly it would have a bearing on the construction of this policy. In other words, one of the main issues, if

(Deposition of Newton C. Bader.)

not the main issue, in this case is going to be the construction of this policy. [72]

The Court: I will sustain the objection. Everything on page 10 I will sustain the objection.

Mr. Halverson: I might ask a question of Judge Askren. Have you been able to find that letter?

Mr. Askren: No, sir. Mr. Bader has no such letter and Mr. Sullivan has no such letter. I have a copy of the only letter that has passed in regard to the Fowles case, written about two years ago, in 1943, and prior to the time he was hurt, and while it has nothing to do with it—I might suggest this, as a matter of legal effect. Supposing at the time this policy was written this company wrote a letter in which we said under this policy we think you can only collect \$5.00 a week, in spite of the fact it says \$25.00. It would not be binding on Mr. Fowles. In other words, the policy provides itself what our rights are and no agent or no vice-president could write a letter in regard to it that would have any effect. It does not mean anything unless it was alleged something was done to affect the terms of the policy. Of course it would be immaterial any way, because it is not even an issue.

Mr. Halverson: I might add the only reason we are asking for this particular letter is the fact we cannot recall with any degree of certainty the contents of the letter, and we wanted it produced. I cannot do any more than produce testimony there was such a letter written, and [73] it referred to this policy. That is the situation in regard to that.

(Deposition of Newton C. Bader.)

Mr. Askren: I think on page 11 it is still along this line, about the letter.

The Court: It does not amount to anything, because he says he does not think he wrote such a letter. I will sustain the objection to everything on page 11.

Mr. Askren: I think everything down to line 27 on page 12.

The Court: This is the Insurance Commissioner Sullivan?

Mr. Askren: No; he is one of the vice-presidents of our company at San Francisco. At the bottom of the page is the first reference to a different letter that is now being asked about—a letter that she was supposed to have written.

Mr. Halverson: I do not want to pursue this any further except Judge Askren has stated there never was any such letter referred to, although at the bottom of page 11 Mr. Bader says: "Well, as I say, there was something in my mind about delivering a letter of some sort, but just what the terms and conditions, or what it was all about and why it was delivered I don't recall." I do not think his statement there never was such a letter is borne out by this testimony.

Mr. Askren: I did not mean to make a statement there was never such a letter. I say nothing was raised as an [74] issue about it, and we find in our files there was no such a letter written, and Mr. Bader has no such letter in his files.

The Court: I do not think you can vary the

(Deposition of Newton C. Bader.)

terms of the insurance policy by some letter that was supposed to have been written by an agent or officer of the company, and not in the nature of a qualified rider.

Mr. Halverson: No, but this letter was written by an officer of the company. As I understand the situation, it was a letter from Mr. Sullivan, who was vice-president of the Commercial Casualty Insurance Company, who forwarded the letter to Mr. Bader, who in turn delivered the letter to Mr. Fowles.

The Court: I will sustain the objection on that ground.

Mr. Askren: The next question is in line 27:

“Q. Do you remember receiving a letter from me regarding the effectiveness of the accident policy since the United States was engaged in war?

“Mr. Askren: Well, I think that the letter from Mrs. Fowles would be wholly immaterial and incompetent and irrelevant and a self-serving declaration. If you just want to call attention to an occasion, I have no objection to that, if you are just calling to his mind a certain time.

“Q. Do you remember an inquiry regarding the accident policy after war was declared? [75]

A. I really don't recall. I would have to look at my correspondence and find out. I don't know.

Q. I realize this is some time back and you handle a lot of claims.

A. A lot of things go over my desk and I don't recall it. I handle a lot of business.

(Deposition of Newton C. Bader.)

Mrs. Fowles: I wish to have this instrument marked Plaintiff's identification 'A' on the deposition.

(Instrument above referred to marked plaintiff's identification 'A' on deposition, the same being hereto attached and made a part of this deposition.)

Q. Is this your writing?

A. That is my stationery.

Q. Is that your signature? A. Yes.

Q. Do you now remember writing this letter in response to an inquiry as to the status of the policy?

A. Yes."

Mr. Askren: I will renew the objection on the ground that any letter written by Mr. Bader in response to a letter written by Mrs. Fowles cannot have any binding effect on the question. I object to it on the ground it is incompetent, irrelevant and immaterial. No agent has any right to do or say anything in regard to the construction of a policy that can change the terms of the policy. [76]

Mr. Halverson: On that letter, we feel it has a very important bearing as far as the construction of this policy is concerned. It is certainly notice with reference to the question of the alleged change of occupation, and at no time has it been asserted that by reason of his entering the armed services that Mr. Fowles was required to take a lesser payment under the policy than he otherwise would. It is our contention there is not and has not been any classification properly filed of risks that would in any

(Deposition of Newton C. Bader.)

way change the right to the benefits which we are entitled to under this policy. That is a question that I think is going to be very important in this case.

The Court: What is the date of the letter? It is a month before he was injured?

Mr. Halverson: As I recall the last premium would have been six months——

Mr. Askren: It was paid biannually.

Mr. Halverson: The last premium we would have paid would have been six months prior to May 5, 1943.

Mr. Askren: That is right. It is a six-months premium payment.

The Court: It seems to me if a person has an insurance policy and changes his occupation and writes to the company and says "Now, here, I am changing my occupation, and I don't know whether I want to continue this policy or not, if I am only going to get a small amount on it," is proper evidence. "If I am going to get the larger amount I will [77] pay my premium. Please tell me." And the company says: "There will be no change in the indemnity because of the change of occupation," and he makes payments of premiums that is not varying the terms of the contract, but it is in consideration of the company's assurance you are going to pay under the terms of the policy. I think such a letter would be admissable, but here you have no change of premiums and no change in conditions as a result of this letter, and since the interpretation of the policy would be by somebody that would have

(Deposition of Newton C. Bader.)

no right to interpret it, I don't think it is material.

Mr. Halverson: We had paid our premiums on this policy in advance, and it was paid up to May 5, 1943. Now that payment is an advance payment which carried this policy in force and effect until May 5, 1943.

(Argument by respective counsel.)

The Court: I will sustain the objection to this letter.

Mr. Halverson: May we have the letter marked as an identification in the record here, Your Honor?

The Court: Yes.

(Said letter marked plaintiff's exhibit "B" for identification.)

Mr. Halverson: It has been offered and the offer has been rejected. I might state the basis of my offer in this case is that it is offered on the ground and for the [78] reason that it shows that the company did not in any way construe this policy as containing a classification of risk that was more hazardous than the one in which the plaintiff was engaged at the time the policy was written; for the further reason it shows the company admitted it had no classification of risk on file, otherwise the company would have so notified the plaintiff, Mr. Fowles; further, that it is some evidence and an admission on the part of the company to the fact it had no more hazardous occupation classified and on file with the State Insurance Commissioner, and that it is further some evidence and an admission on the part

(Deposition of Newton C. Bader.)

of the company that it never called in the policy, cancelled it or requested that it be called in or cancelled, and is evidence the company considered the policy as being in full force and effect as written, so long as the insured was within the territorial jurisdiction of the United States.

The Court: The objection is sustained. Is that all of the deposition you care to read?

Mr. Halverson: I guess Judge Askren had some cross examination. There is a little more direct examination.

“Q. One more thing, Mr. Bader, did you know the National Guard was mobilized?

A. Yes, that was common knowledge; everyone knew that. [79]

Q. Did you know that the National Guard was made a part of the Army of the United States?

A. I believe so.”

“Cross Examination

By Mr. Askren:

Q. As I understand from you, Mr. Bader, you were not a general agent of the company?

A. No.

Q. The license you speak of is a license issued by the State of Washington which entitles you to act as agent or broker for the insurance companies?

A. Yes.

Q. When the state issues you that license that gives you statewide authorization unless the com-

(Deposition of Newton C. Bader.)

pany you work for now should say 'We want to confine your work within a certain radius,' something of that kind? A. That is right.

Q. The State agency is located in Seattle, is it not? A. Yes.

Q. He is the one who appoints—at least he, in company with the head office, appoints the different men. You have nothing to do with the appointing of other agents?

A. No, sir, nothing at all.

Q. And you have no general authority or other authority different than that possessed by the man in the smallest [80] community or anywhere else?

A. Or the largest community.

Redirect Examination

By Mrs. Fowles:

Q. Mr. Bader, did you receive your license or appointment as agent directly from the Seattle office? A. Yes.

Mrs. Fowles: Did I understand you, Judge Askren, to say that the area in which he solicits insurance was limited?

Mr. Askren: No. He spoke of the license, and I said the license you spoke of is the license issued by the State to a man to engage in the insurance brokerage or agency business, and that that gives him the right to sell insurance anywhere in the state with the exception that perhaps any individual company he might work for might say to him, 'Now, we have an agent in Tenino and an agent in Bu-

(Deposition of Newton C. Bader.)

coda, therefore don't you sell outside the city limits of Olympia, or don't sell in the smaller towns,' something of that kind."

Mr. Halverson: That is an argument by Judge Askren.

"The Witness: Certain companies give you a restricted district and other companies you can write anywhere.

Q. Did you write under a general agency?

A. I don't know what they call——(interrupted)

Q. Or did you deal directly with the Seattle office?

A. The Seattle office with this company is not a general [81] agent; they are a state agent.

Q. Seattle is headquarters for the state?

A. Yes, for western Washington, and I believe they have an office in Spokane for eastern Washington.

Q. Have you ever settled any claims for the company here? A. Yes.

Q. Have you delivered the checks?

A. Delivered the checks, certainly. All agents do the same thing.

Q. Did you handle the whole proceedings, or did someone come down from Seattle?

A. In some cases they came down from Seattle where I didn't have the time or was out of town on my trips, and in other cases I handled them all right there.

Q. If you were here you took charge of the settlement?

(Deposition of Newton C. Bader.)

A. No, not in all cases. Just depended on the conditions. If I had the time to do it, that was all.

Mrs. Fowles: That is all.

Recross Examination

By Mr. Askren:

Q. Your authority, Mr. Bader, as an agent in making a settlement of claims that were made, was that an authority which you had to submit to the higher-ups, to either the state or the general agent to get approval? A. Yes.

Q. You didn't have the authority on your own hook to make settlements? [82]

A. No, sir. No agent has that.

Redirect Examination

By Mrs. Fowles:

Q. Do you remember, Mr. Bader, saying that you had full authority to settle claims, that he need not worry?"

Mr. Askren: This is highly immaterial.

The Court: I sustained an objection to that previously, and I sustain the objection to this question.

"Q. When the plaintiff refused to accept the policy as it was, you say you don't remember advising that he was safe in taking it, that you would take care of it?

Mr. Askren: There is no evidence that he refused to take the policy."

The Court: I will sustain the objection. I will sustain the objection to the rest of the questions.

JUNE FOWLES

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Halverson:

Q. I hand you here, Mrs. Fowles, plaintiff's exhibit for identification "C", and ask you to state what that is?

A. This is a telegram I received from Mr. Bader in answer to one I had sent to him informing him of my husband's injury and asking what the terms of the policy were. [83]

Mr. Askren: I do not think she should testify to the telegram she sent. That is not the best evidence, and I would like to know what that is.

Q. You received that from Newton C. Bader, of Olympia, Washington? A. Yes, sir.

Q. And that was received in reply to a letter or wire you sent to him?

A. A telegram I sent to him.

(Witness excused)

Mr. Halverson: I now desire to offer that in evidence.

Mr. Askren: I object on the same ground. This is apparently a telegram from Mr. Bader with regard to the policy—a statement by the agent, and it was after the accident took place.

The Court: There is no question about notice to

the company? You are not raising any issue that you were not notified?

Mr. Askren: There is no question about the fact we knew of the accident, and the only dispute is whether or not we have complied with the law.

The Court: I will sustain the objection.

Mr. Halverson: I desire to make an offer on that. The plaintiff offers identification "C" for the following [84] reasons: first, that it is a wire received from the agent of the company subsequent to the date of the injury; that it has some evidentiary value as to the proper construction of the policy as to whether the defendant insurance company considered it had a proper classification of risk on file, which in any way limited or changed the benefits payable under this policy to an amount less than \$25.00 a week.

The Court: You are talking about a proper classification of risk on file. Isn't that a matter to be proven by the records of the Insurance Commissioner?

Mr. Halverson: Yes.

Mr. Askren: As a matter of fact counsel and I have stipulated we can produce a letter from the Insurance Commissioner instead of bringing him here.

Mr. Halverson: We stipulated I would not require the Insurance Commissioner to come over, and if you said there was something on file I would not require it to be identified, but I am not stipulating they do have any classification of risk covering this policy.

Mr. Askren: That is what happens when you stipulate, Your Honor. I understood I could produce a letter from the Insurance Commissioner's office which would show we had on file our classifications, and it would show the amount, so the Court could see what our classification showed. Since then counsel mentioned last night that he has subpoenaed a [85] man out of the Insurance Commissioner's office, and he will have it here. I am not sure whether he is here at the moment.

Mr. Halverson: Yes, he is right here.

The Court: I do not see how a telegram could be of any value in determining what is on file in the State Insurance Commissioner's office. I will sustain the objection, and refuse to accept the offer of the proffered telegram.

Mr. Halverson: In view of Your Honor's ruling at the beginning as to the burden of proof, before resting my case it is my position that the question of a change of classification, if there was a change of classification, and likewise if there was a classification on file pertaining to this policy, that is a matter of defense. I do not know whether I correctly understood Your Honor at the beginning.

The Court: I do not think you have the burden of proof. I think under the pleadings you have the burden of going ahead with the testimony to show the allegations in your complaint are true. That is, that they have refused to pay on the ground there was a change of occupation. I do not think the burden of proof shifts. That is a

matter of defense. You sue on the policy and they then say the man was not covered to the extent of \$25.00 a week, and was [86] only covered to the extent of \$5.00 a week, because of a change of occupation. But I do think in order to sustain the burden you have of going ahead with the testimony, you would have to prove the reason why they refused to pay.

Mr. Halverson: That we have to prove the reason why the insurance company refused?

The Court: You have alleged in your complaint they have refused to pay more than \$5.00 a week, and state the reasons for it.

Mr. Halverson: I will call at this time Mr. Kuechelhan.

LEE I. KUECHELHAN

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Halverson:

Q. Will you state your name to the Court, please? A. Lee I. Kuechelhan.

Q. What position do you hold?

A. Deputy Insurance Commissioner.

Q. Do you have with you and in your possession now the records and files of the office of the State Insurance Commissioner of the State of Washing-

(Testimony of Lee I. Kuechelhan.)

ton relative to the Commercial Casualty Insurance Company?

A. Yes, sir. I have certain of those records.

Q. Do you have all of the manuals or classifications of risk [87] that have been filed in the office of the State Insurance Commissioner of the State of Washington with you?

A. Yes, sir, with respect to the commercial division or the commercial section of the accident and health policies.

Q. Do you have a classification of risk that was filed in your office by the Commercial Casualty Insurance Company?

A. The first one I have here is commercial division accident and health manual filed in our office on May 29, 1929.

Mr. Halverson: Now, with reference to this, Your Honor, of course I am going to have to have this in evidence. I do not know how we are going to do it.

The Court: Let me see it. (handed to court)
This is an official file of the manual?

A. Yes, sir.

The Court: Have you a copy of the manual?

Mr. Madden: We do not have a copy of that particular one.

Mr. Halverson: It is our contention that the copy of the manual which they have is not controlling, and that likewise this one is not controlling, because this one was filed in 1929, and makes no mention whatsoever to the Star accident policy,

(Testimony of Lee I. Kuechelhan.)

form 14-H, and our contention is as to the other manual, which is referred to, and which Mr. Kuechelhan has here, has no application whatsoever to this policy.

Mr. Askren: This policy was written in 1937. This [88] manual is in 1929 he refers to.

The Court: When did they file a later manual?

Witness: I have another manual here of the commercial section filed October 1, 1932.

The Court: Is that the one you think controls?

Mr. Madden: That is right, Your Honor.

The Court: Is that a supplement to this one?

Mr. Halverson: No. It is our contention that is nothing more than an agents' manual, and has no reference to this policy whatsoever, and there is no way that it could be connected up with this policy, and as I remember the statute it says when the form of policy is filed there must be simultaneously filed a written classification of risks pertaining to that policy, and I think I have the authority directly in point.

Mr. Madden: The manual you have before you contains classifications of risks covering all the occupations they cover. At that time they put out several other policies. They have probably ten different types of policies, and all that is required is when they file the policy they file a statement of charges to be made for the issuance of the policy. The manual you have in your hand is a manual which is a continuing one until they amend it by filing another one, which is amendatory thereof,

(Testimony of Lee I. Kuechelhan.)

and that one there contains the company's classifications of risks, and the red [89] manual subsequently filed contains the classifications. The only thing the company must do when it files a new policy is to file a statement of rates for the issuance of that policy, and the classification does not change.

The Court: I have filed dozens and dozens of them. I never could get by without filing the coverage.

Mr. Madden: I do not understand.

The Court: You say only the rates need to be filed with the Insurance Commissioner. You have to file coverage too.

Mr. Madden: Yes, but in this case they had the classification of risk on file, and that is that black book, and the same risks applied to all the policies. The only question was one policy would cover down to a certain risk and the other would take more hazardous occupations.

Mr. Halverson: That does not cover all the policies. The front part of that mentions the policies to which that appertains, and it does not list the 14-H policy.

The Court: As a matter of procedure here, can we not put each one in an envelope and have the envelope marked, because we do not want to mark on the book, and you can offer both of them. I would say I think I should let in evidence all the records of the Insurance Commissioner that might

(Testimony of Lee I. Kuechelhan.)

even possibly pertain to this matter. I want the whole thing in. You can offer it, and have it marked as exhibit "D". We will have to figure out some way later of getting the record. Have you any objection to these? [90]

Mr. Askren: No.

The Court: That is the 1929 manual. Are you going to offer the 1932 one? (Exhibit "D" admitted in evidence.)

Mr. Halverson: No, Your Honor, because it is our position that has no application.

The Court: Are you going to offer it?

Mr. Askren: Yes.

The Court: We will mark that defendant's exhibit "1".

Witness: We can furnish a copy of the 1932 manual.

The Court: All right.

Mr. Halverson: So the record is clear, and I do not want Judge Askren to feel there has been any misunderstanding—there is not on my part—my objection does not go to the fact it was filed. I will admit this document was filed, but my objection goes to its relevancy, it has no reference to or connection with this policy.

The Court: That is what we will have the argument about. We will admit exhibit "1".

(1932 Manual admitted in evidence as defendant's exhibit "1".)

The Court: Have you anything else here?

(Testimony of Lee I. Kuechelhan.)

Witness: I have some things here. I don't know what you want.

Q. (Mr. Halverson): This policy was filed as of what time? This Star accident policy?

A. It is marked here as 14-H, filed in our office on June 3, 1931. [91]

Q. Does that have at the bottom of the page these numbers, A and H 5643-25M-11-30-7275?

A. That is right.

Q. That form of policy you have there which is shown as being filed on June 3, 1931, is the same as the plaintiff's exhibit "A", which is Star accident policy 14-S? A. It is identical with that.

Q. With the exception, Mr. Kuechelhan, of the plaintiff's exhibit "D" and the defendant's exhibit "1", do you have in the records and files of the State Insurance Commissioner's office any other schedule or classification of risks of the Commercial Casualty Insurance Company on file?

A. Do you mean of the commercial section?

Q. I mean for the Star accident policy.

A. No.

Q. With the exception of those two exhibits there is no other schedule of risks on file in your office with reference to a Star accident form policy?

A. Classification of risk?

Q. Yes. A. That is right.

Mr. Halverson: That is all.

(Testimony of Lee I. Kuechelhan.)

Cross Examination

By Mr. Madden: [92]

Q. May I see that hand-book?

A. That is another section.

Q. Have you got it there?

A. Yes, sir; this is it (indicating).

Q. Tell us what it is.

A. This is a classification manual of the accident and health department, general division, filed May 15, 1933.

Q. Showing you this black manual, will you state the classification of a postal service mail carrier, city, on foot? Shall I point to it?

Mr. Halverson: I think that is the best evidence of it.

Mr. Madden: There is no question about that, but I wanted it in the record.

The Court: I think it should be in the record.

A. Mail carrier, city, on foot, Class B.

Q. In that manual will you turn to army officer, if you can find it?

Mr. Halverson: I object to these questions on the ground and for the reason that this manual is not in any way applicable to this policy in question. It appears on the face of it it is not applicable to this policy in question.

The Court: You put it in evidence.

Mr. Halverson: I put it in evidence to show it does not apply. [93]

(Testimony of Lee I. Kuechelhan.)

The Court: It is a matter of cross examination.

Q. Did you find it? A. Yes, sir.

Q. Will you just read what you have for army officers giving the description and classification?

A. "Commissioned officers and enlisted men, army or navy, on active military or naval service anywhere in the world during war, insurrection, invasion or punitive expeditions (the term 'enlisted man' includes all men below the rank of a commissioned officer) (not insurable), Class K."

The Court: What does the term "not insurable" mean?

A. It means enlisted men below the rank of a commissioned officer are not insurable.

The Court: Are there two of them?

A. Yes.

Mr. Madden: I think the wording is the same in both.

Q. Now actually the Commercial Casualty Insurance Company did not file rates on the Star policy for a K classification, did it? They did not write down to that risk? A. That is right.

Q. Refreshing your recollection?

A. That is right, as far as the classifications are concerned.

Q. That have been filed with you. Their classifications indicate they write the Star accident policy only for risks to the extent of "D"? [94]

Mr. Halverson: I object to that. The record is the best evidence, and not what it would indicate

(Testimony of Lee I. Kuechelhan.)

they do. He has identified that in the record, and the record speaks for itself.

The Court: Yes. As far as being evidence is concerned that is true. I would like the assistance of this witness to explain what these things in the way of words mean, but it is not evidence. The manuals are the best evidence.

Mr. Halevrson: This man was not offered as an expert to explain them. We do not have any objection to going into anything that will assist Your Honor, but at the same time——

The Court: If he can help me in understanding the manuals I would like to have his assistance.

Mr. Madden: This man has been put on the witness stand to show we did not have the rates filed. This man can not change them and maybe he cannot interpret them, but——

The Court: It is 12 o'clock. Maybe you can get together during the noon hour and get the matter clarified.

(Whereupon a recess was had to the hour of 1:45 o'clock p. m. June 15, 1945, when the trial was resumed, the witness Keuchelhan again taking the witness stand.)

Q. (Mr. Madden): Mr. Keuchelhan, to go back for a moment, will you tell the Court what the procedure or requirement of the Insurance Commissioner is with regard to filing a manual of classification of risks when a new accident and [95] health company starts doing business in the state?

(Testimony of Lee I. Kuechelhan.)

Mr. Halverson: I object to that as being incompetent, irrelevant and immaterial. The procedure, as I view it, is set out in the statute, and that I respectfully submit is controlling.

The Court: He cannot vary the statute. He can state the procedure they use in applying the statute, but if it is not in conformity with the statute it will be of no value. Let me see the statute. (Statute handed the Court)

Mr. Halverson: 7233. And on that question I want to cite Your Honor the case of Nordin vs. Commercial Casualty Insurance Company, a Washington case, 176 Washington at page 59, which never has been overruled, modified or changed, and which construes that statute. (Citing and reading from said citation, and argument).

The Court: As long as we have gotten this far in this argument, I would like to hear from you on the other side. What is your position? (Argument by Mr. Madden)

The Court: Where is there anything in the red manual to comply with the requirements of the Nordin case? If you want to study the Nordin case you may do so.

Mr. Madden: I would be glad to.

The Court: We will take a few minutes recess.

(Short recess) [96]

Mr. Madden: Before continuing the cross examination I would like to ask one or two questions.

Q. (Mr. Madden): Do you have, Mr. Keuchel-

(Testimony of Lee I. Kuerhelhan.)

han, a paper setting forth the premium rates and classifications for the Star accident policy?

A. Yes, sir; I have. There is one here in 1934, the Star policy (handing to Mr. Madden). There are others, but that is the latest one.

Q. May I see the others? (Witness hands to Mr. Madden)

A. Here is one that was filed at the time the policy form was filed (handing to Mr. Madden). And there is one here filed in 1939 (handing to Mr. Madden).

Q. I think that would not be pertinent. Have you a prorating form?

A. Yes, sir. We have two proratings and schedule of rates, one filed in August, 1934, and one in December, 1934.

The Court: Are they a part of your official records? A. Yes, sir.

The Court: Can you put them in an envelope? I do not like to mark up their file.

Mr. Madden: I would just as soon put them all in one envelope.

The Court: Yes.

(Envelope and contents marked for identification as defendant's exhibit "2".) [97]

The Court: We can arrange some way to have copies submitted.

Q. (Mr. Madden): Now, the Star accident policy, that is one policy—it is all the same form—each Star accident policy is not different?

(Testimony of Lee I. Kuechelhan.)

Mr. Halverson: The policies themselves would be the best evidence.

The Court: I will sustain the objection.

Mr. Halverson: Do I understand those have been offered?

The Court: Yes, they have been offered.

Mr. Halverson: I want to note an objection.

The Court: I will hear your objection.

Mr. Halverson: I object to them on the ground they are incomeptent, irrelevant and immaterial, and do not in any way tend to establish a schedule of risks applicable to the policy here in question. All they are, they purport to be a rate schedule which in no way satisfies the statute on the particular point here in question, and as I recall one of these which is filed June 3, 1931, applies only to classes A, B, C and D, and the policy number which appears at the bottom is not the same as the policy, plaintiff's exhibit "A", the wording at the bottom of this being Cas. A and H 5611-25M-11-30-7109, and the policy here in question being designated Cas. A and H 5643-25M-11-30-7275.

The Court: It may be admitted. [98]

(Envelope and contents admitted in evidence as defendant's exhibit "2".)

Mr. Madden: If Your Honor please, I should like now to take up the Nordin case. (Argument by Mr. Madden)

The Court: How can you get to K when you do not write K, when you refer in the manual to K as being non-insurable?

(Testimony of Lee I. Kuechelhan.)

Mr. Madden: Because we have situations such as the identical one before us now where a man goes from a B classification, which we do write, to a K classification. We cannot cancel the policy, and we have to have some basis upon which we can prorate the difference between the two and find out what he is entitled to. If Your Honor will look at the prorating—this is the prorating schedule where it goes only to J, and it comes out mathematically about the same, but we are estopped to prorate it any lower than J, because that is as far as we have gone. In that prorating schedule they did not go any further than J, because that is the limit they write in any policy, whether it is a Star or any other policy. The Star is a preferred risk policy where they write only to D. (Argument)

The Court: Which one of these do you contend complies with the requirement of the Nordin case, which says you must file a schedule appertaining to the policy?

Mr. Madden: I contend that the red manual is the one upon which we have a right to depend. In other words, the [99] black manual has a schedule of risks, and it was superceded by the risks in the red manual. Then together with that we have filed a schedule of rates wherein we set forth the risks as A, B, C, D and E. (Argument)

The Court: Do you know whether this company had a manual on file prior to 1929?

Witness: I could not tell you that. I thought

(Testimony of Lee I. Kuechelhan.)

I had all the manuals they had on file. They asked me to bring those over with me.

The Court: When the new manual is filed do you release the old one?

Witness: We would keep that old manual on file unless they directed us to void that manual, and this would apply to everything. Between the time that manual was filed and this one there were many policies written. This manual would cover then on anything that was written while that was on file and before this one was filed (indicating).

Mr. Madden: May I add something to that? The company does not withdraw any manual, for the reason the policy may be in effect for 30 or 40 years.

The Court: Yes. All right, go ahead.

Q. (Mr. Madden): Mr. Keuchelhan, when a manual of risks is filed by a company and a new policy is thereafter filed, do you require a new filing of another manual of risks?

Mr. Halverson: Just a minute. I object to that. [100]

The Court: I think the objection is well taken, but I will let him answer the question.

A. As far as I know, the Commissioner's office does require an additional classification manual to be filed unless it may be some special policy form applying only to certain classes.

Q. But if the new policy embraces the same classification as to A, B, C, D, that has already

(Testimony of Lee I. Kuechelhan.)

been filed by the manual of risks, the old manual on file applies to the new policy?

A. It is considered sufficient as a rate sheet with reference to a class.

Mr. Halverson: It is understood this is going in over my objection?

The Court: Yes. It is all over your objection.

Mr. Madden: That is all.

Re-Direct Examination

By Mr. Halverson:

The Court: Should we cross out this June 5, 1942, on the front of this red manual and write down here "Effective March 1, 1932"?

Q. (Mr. Halverson): I hand you here part of defendant's exhibit "2", dated June 3, 1931, which is entitled "Premium Rates for Star Accident Policy", and I will ask you to state if that is the premium rate that was filed with the Star accident policy, being plaintiff's exhibit "A", in your office?

A. Yes. That rate sheet is attached to the policy and it is identical with this one, is it not (indicating)?

Q. Yes. A. That is right.

Q. And that refers to classes A, B, C, and D?

A. That is right.

Q. How long have you been in the office of the Insurance Commissioner?

A. I have been with the office since 1938.

Mr. Halverson: That is all.

Mr. Madden: That is all.

(Witness excused)

Mr. Halverson: I haven't had an opportunity to compare these, and I assume the fact one has a 1942 stamp on it does not mean it was a later edition.

The Court: Are you sure?

Mr. Madden: I am positive they are identical. I have compared them quite thoroughly.

Mr. Halverson: The plaintiff rests, Your Honor.

Defendant's Evidence:

KEITH FISK

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Askren: [102]

Q. Please state your name.

A. Keith Fisk.

Q. What is your occupation?

A. An employee of the Loyalty Group of insurance companies, one of which is the Commercial Casualty Insurance Company.

Q. And you have been with them a number of years?

A. Five years.

Q. Are you familiar with the form and so forth of the policies they write?

A. Yes.

Q. I will show you what has been marked as plaintiff's exhibit "A", and I will ask you whether or not all Star accident policies written by the

(Testimony of Keith Fisk.)

Commercial Casualty Insurance Company are on this identical shape of paper and the same printing and everything?

Mr. Halverson: I object to that as not being the best evidence. Whether or not this is the same as all of them would depend on the particular instrument involved.

The Court: He said he had been with them only five years.

Mr. Askren: But it will be as to the five-year period he has been with them. This is attempting to prove a negative, because of the fact when Mr. Kuechelhan was asked if all Star policies were the same, the objection was raised he had not seen them all, but this is a man in the company. [103]

The Court: He testified this policy was written in 1937. Can he testify all policies in 1937 are the same? That is what we are interested in.

Mr. Askren: Perhaps if counsel will not agree I will have to ask for a continuance to furnish that information. Counsel raised the question whether the Star policy was covered by the rates.

The Court: I think I would be in error to let this man testify now and draw a conclusion from it. I don't think your record would be any better than the record in the Nordin case.

Mr. Askren: That is beyond the five-year period, but he is the only man here that has familiarity with it.

The Court: I will give you time to prove that,

(Testimony of Keith Fisk.)

Judge, but I do not think it should rest on testimony of this kind.

Mr. Askren: This will be my last witness. May we have a few minutes' recess to consider it, because I think I can convince counsel very quickly.

The Court: All right. I want to read this case anyway.

(Short recess)

Mr. Askren: In discussing the matter with counsel, we found among ourselves on investigation, that some of the Star policies, there have been changes—I do not know whether they are slight or major—but in any event the thing I was suggesting to counsel was something he does not [104] want to agree to, and I was thinking in good faith all of the Star policies had exactly the same wording, but there is some slight change, and I am unable to go any further, and I am unable to ask counsel to make a stipulation. There is one thing in connection with it about which I am a little embarrassed because of the situation. Does Your Honor intend to leave Yakima at the end of this week?

The Court: Yes.

Mr. Askren: The first time I heard there would be a question about it was ten minutes to six last night, and I haven't had a chance to communicate with the company in San Francisco, and therefore I have not been able to present it as carefully as I should. I was not the company's counsel at the

time the Nordin case was tried, and I am not familiar with it, but in any event I should like to have additional time if it could be given me. I will not be able to get somebody here from San Francisco to testify to it, and I assume Your Honor will leave the bench at the end of the month, and I should like, if it were possible, to be able to get this information from San Francisco in connection with it, so I will be better able to explain the particular situation in regard to these policies. I am satisfied in my own mind that the insurance company, being faced with the decision, the Insurance Commissioner's office having accepted the filing, and no [105] question having been raised from that time on until it was raised now, there is no doubt a good and sufficient answer to it.

I want as far as this particular phase of the case is concerned to see that all these exhibits brought over by the Insurance Commissioner have been offered in evidence, so there will be no question about all of our rates that were filed being presented to the Court. I do not mean to go beyond the date Your Honor set in 1937, but from the date of the policy down to the present time, or before the policy was issued up to that time, those are factors that should be considered by the Court, and——

The Court: I have let everything in.

Mr. Askren: I wanted to be sure they were before Your Honor, and that being true I will rest my case, because I cannot in reason ask for time to get somebody here in case I can furnish the

explanation, if Your Honor is not going to be available to receive it.

The Court: I hate to put you in that position, Judge, but I do have to get things finished. I have four cases under advisement I have to decide next week, and I have to get started to Washington some time.

Mr. Askren: In all the discussions back and forth I never knew until ten minutes to six the question was going to arise. There is nothing in the pleadings to indicate it. [106] I do not mean to say counsel misled me, but we discussed a lot of things and nothing was said until ten minutes to six last night, so I did not have an opportunity to get any information on that point.

Mr. Halverson: So I may explain my situation, counsel says he knew nothing about this. Last night at six o'clock he came in my office, and at that time counsel was very positive he never had been served with a reply in this case, and asserted very definitely that if it was filed there would be fireworks about it, and I was quite concerned about the matter myself, because I had not handled this, and it developed, however, that the reply was served upon Judge Askren and was accepted in his own handwriting. I am not sure of the date, but the record will show.

Now as far as the question of this issue being presented, I do not know where counsel gets his idea that it was not going to be presented unless it follows his assumption we had filed no reply and were going to admit all of that, but certainly

Mr. Madden was down at Olympia, I think the same day that Mrs. Fowles was there, checking these various matters over. We served in this case a subpoena on the Insurance Commissioner, and that subpoena is very broad, a subpoena duces tecum, and we required him to bring in all of the records and files in his office relating to this policy, all schedules of risk filed, all rate [107] schedules filed and all other papers in his office relating to this matter. I might read it if Your Honor is interested in it. Counsel knew that I was having this subpoena issued. Do you have the original, Mr. La Framboise?

Clerk La Framboise: No original has been filed yet.

The Court: You allege in your answer he was classified in Class K for rate purposes. You have never filed anything about Class K with the Commissioner with reference to the Star policy.

If it would be of any assistance to you, Judge Askren, to let you come to Spokane next week, if Mr. Halverson will consent to it, you could 'phone down to San Francisco, and I will be here tomorrow morning.

Mr. Askren: I am afraid I would not be able to get the information so I could present it. I would have one of the men fly up. It may be he cannot get it.

I do not want counsel to feel that I accused counsel of any bad faith. I said in the discussion it did not even occur to me there was a question about the rates being right, and that they had been

properly filed. It is true they were denied in the reply. The reply was lost in our office, and nobody in that office knows where it is. I signed it, and I have never seen it since. I assumed there was no question about it.

The Court: Under the general federal rules a reply is unnecessary. The affirmative matters are deemed denied. [108] But we have a special rule in this district requiring a reply.

Mr. Askren: I was not complaining about it not being served, but I did not know it would be an issue. I am not accusing counsel, and I did not intend to be negligent in the matter.

The Court: Mr. Kuechelhan, did you bring everything with you in the Insurance Commissioner's files?

Witness Kuechelhan: Yes. Everything I could find on this particular Star policy back as far as 1929, which was some eight years prior to the date of this policy.

The Court: Have you seen everything he has?

Mr. Askren: Yes. I will take his statement that is all they have.

The Court: I do not see anything they could bring up from San Francisco. As you have the evidence here from the Commissioner's office, I do not see how they could bring up anything from San Francisco that would add to it.

Mr. Askren: It seems to me it cannot be possible, after they were stuck for the full amount of the policy of insurance, this had not been done. It may be I could not find anything, but if the

decision should go against my company, I do not want the company to feel I have not properly presented the matter. [109]

Mr. Halverson: It seems to me it is not what they have in San Francisco. It is what they had on file in the office of the Insurance Commissioner of the State of Washington. They have no right to write any policy unless they have first filed it in that office, and followed these other steps, whether they had any number of different forms or they were all the same. The question resolves itself back to what was on file in the Commissioner's office.

The Court: Let us close the case and argue it. If you find out something in the next few days you will have to come to Spokane.

Mr. Askren: I would be glad to do it.

The Court: We will go ahead. Have you any other testimony?

Mr. Askren: No; that is all.

The Court: All right, Mr. Halverson.

(Mr. Halverson, Mr. Askren and Mr. Madden then argued to the Court.) (At the conclusion of the argument the Court rendered the following oral decision:)

ORAL DECISION OF THE COURT

The Court: I am not going to pass upon the question of the change of occupation, nor determine the question of whether or not it needs to be voluntary. I am expressing no opinion on that one way or the other, and I am not [110] deciding

the case upon the basis of estoppel, although I will say it occurs to me there was some obligation on the part of this company, knowing this man was in the National Guard, and knowing that the National Guard was mobilized in 1941, there was some obligation on its part to not accept the premiums from which he was to get \$25.00 a week and not let him know if he got injured as he did here that they intended only to pay him \$5.00 a week, and make certain mental reservations on it.

I am deciding the case upon the basis of the Nordin case. Counsel refers to it as a technicality. It may be. If it was a technicality it was pointed out to this particular company very definitely and emphatically by the Supreme Court of the State of Washington, and they knew it was not a mere technicality before, and they should have complied with the requirements of the Supreme Court's ruling. I see no question about the company's failure to comply with the statute as the statute has been interpreted by the Supreme Court.

I am reading from *Nordin vs. Commercial Casualty Insurance Company*, 176 Washington, 64:

"The determinative feature of this case, as we view it, rests upon the respondent's failure to establish the fact that it had filed with the Insurance Commissioner of this state a copy of its classification of risks pertaining [111] to the policy in suit, as required by the statute.

"Rem. Rev. Stat., Sec. 7233, provides that no accident insurance policy shall be issued or delivered until a copy of the form thereof and of the

classification of risks pertaining thereto have been filed with the Insurance Commissioner.

“Thus it will be seen that the policy is to be held a valid and binding contract, but, in so far as it conflicts with Sec. 7233, *supra*, the provisions of the latter shall govern. Expressed according to result, the policy does not draw to itself, as part thereof, any classification of risks therein referred to, unless a form of such classification pertaining to the particular policy has been filed in accordance with law.”

Now counsel for the defendant takes the position that the defendant's exhibit “1” was controlling at the time the policy was issued.

This is the manual of the Loyalty Group. It is not even a manual of this particular insurance company, but a manual of the Loyalty Group, of which this insurance company is a member, and it limits the risk on all policies issued by whatever companies are members of the Loyalty Group.

The testimony of the witness from the Insurance Commissioner's office that they filed it with the Star [112] policy at the time it was filed, must be construed to be an attempt to comply with the classification requirement pertaining to the policy, and not in a classification of the limitations of the risk. It has classes A, B, C and D, and is the premium rate for those accident policies. These other papers that were filed are nothing more than premium rates.

I agree with Judge Askren that I cannot conceive of this company, having gone through this

experience once, that they would turn around and do it just as bad over again, but after this case was decided in January, 1934, they had on file their manual for the whole Loyalty Group of insurance companies, not referring to any policy, and then they say that these papers they filed of statements of premium rates are sufficient to meet the requirements.

It is true they did not have all the evidence before them in that case that they wanted to have, but you have all of it here, and there just isn't anything here that the statute was complied with and that they filed any classification pertaining to this policy. They didn't even file a classification of risks pertaining to the Commercial Casualty Insurance Company, but filed a general classification of risks for all the companies in the Loyalty Group.

I will hold in favor of the plaintiff. On this [113] question of the hospital, the plaintiff is entitled to recover for that portion of the time—he was in this hospital five weeks, wasn't he?

Mr. Halverson: Yes; in the Hahnemann Hospital.

The Court: He is not entitled to recover during the time he was in a government hospital. Is there any other question about the amount involved?

Mr. Halverson: No, Your Honor.

Mr. Askren: There will not be any dispute on that. Will Your Honor give me an opportunity to look into this matter further?

The Court: Yes. If you find something more.

If this is all that was filed, I am satisfied it is not sufficient to comply. It is not your fault. The company got itself in that trouble once, and they should have had a little more care not to do it again.

Mr. Askren: I do not want to reargue it.

The Court: If you have something further, if you find something further, you can 'phone me. I will be in Spokane and it may be we can arrange for you to come over there. I will not foreclose you if you can find some other facts. We should get copies of these exhibits as quickly as possible. The Insurance Commissioner will want them back.

Mr. Askren: Would it be agreeable to the Court and [114] counsel—perhaps I can get a copy of the black book from San Francisco. We have copies of the red book, and we can have copies made of these others so we can keep in the record exactly the same things. It would not be much trouble to copy these other things. Would that be agreeable?

Mr. Halverson: Yes, surely. There is one thing in connection with this case, the deposition here that was taken in Philadelphia is addressed through error to June Fowles, "Clerk of the District Court", and we believe our copy of the deposition is included with the original. It became immaterial in view of the stipulation, and I wonder if it might be published and we be permitted to withdraw simply our copy of it.

The Court: Yes.

Mr. Halverson: It contains the X-rays, but we are only interested in withdrawing our copy.

Mr. Askren: We have no objection.

The Court: It may be published.

(Court was then adjourned.) [115]

This cause came on for argument on defendant's motion for a new trial, at Spokane, Washington, at the hour of 2:18 o'clock p. m., June 22, 1945; C. W. Halverson and June Fowles appearing as attorneys for the plaintiff, and William J. Madden appearing of counsel for the defendant on behalf of the defendant, whereupon the following proceedings were had, to-wit:

The Court: I want to make a further record in this case of Fowles vs. Commercial Casualty Insurance Company.

During the trial there was admitted in evidence defendant's exhibit "1", which is the manual of the accident and health division of the Loyalty Group, commercial section.

The witness who had the difficult name to pronounce——

Mr. Madden: Mr. Kuechelhan.

The Court: From the office of the Insurance Commissioner, had brought on subpoena the original which was filed with his office, effective October 1, 1932. In order not to take from the records of the Insurance Commissioner their part of the file which was necessary, it was stipulated that a copy could be substituted for the original, and this exhibit "1" is the copy which was substituted.

In my oral opinion at the close of the trial, I called attention to the fact that I had before me the exhibit as it was introduced. I called attention to the [116] fact that this manual did not refer to the defendant Commercial Casualty Insurance Company, but only referred to the Loyalty Group, of which the Commercial Casualty Insurance Company is a member.

I placed no particular emphasis on that point, and I don't think it makes any difference in the outcome of the case. I do not think it makes any difference in my decision of the case.

After the trial was over the representative of the Commissioner's office called the attention of the Clerk to the fact the original that was on file had typed or stamped on it the name of the defendant Commercial Casualty Insurance Company, so I wanted the record to contain this statement, showing that while my statement was correct as far as the copy was concerned, it was not correct as far as the original was concerned—the exhibit was not a true copy of the manual, in that it does not contain the stamped or printed language naming the Commercial Casualty Insurance Company. Does that take care of it?

Mr. Madden: Yes; that is satisfactory, Your Honor.

(Mr. Madden then argued the motion of defendant for a new trial.)

The Court: The motion will be denied.

(No further proceedings had.) [117]

DEFENDANT'S EXHIBIT No. 2 COMMERCIAL CASUALTY INS. CO.

PREMIUM RATES FOR THE STAR ACCIDENT POLICY

Rates for each	CLASS A		CLASS B		CLASS C		CLASS D*	
	Ages 18-60	Ages 61-65	Ages 18-60	Ages 61-65	Ages 18-60	Ages 61-65	Ages 18-55	Ages 55-60
1,500.00 Principal Sum and \$5.00 Weekly Accident Indemnity	\$2.00	\$4.10	\$2.40	\$5.25	\$2.80	\$6.40	\$3.40	\$7.15
	3.00	3.00	3.60	3.60	4.20	4.20	5.10	5.10
	\$5.00	\$7.10	\$6.00	\$8.85	\$7.00	\$10.60	\$8.50	\$12.25

Limits.

Policies may be issued in any combination of Principal Sum and Weekly Indemnity not exceeding \$30,000.00 Principal Sum and \$100.00 Weekly Indemnity. Applications in excess of these amounts may be submitted to the Home Office for special consideration. Policies must not be issued where the Principal Sum exceeds \$1,500.00 for each \$5.00 weekly indemnity.

Filed.....
Effective Jun 3 - 1931

Defendant's Exhibit No. 2—(Continued)

COMMERCIAL CASUALTY INS. CO.

LOYALTY GROUP

PREMIUM RATES

for

New Ultimate Accident Policy

New Ultimate Disability Policy

Income Accident Policy

Income Disability Policy

Majestic Accident Policy

Star Accident Policy

Sterling Life & Limb Policy

LOYALTY GROUP

Premium Rates for New Ultimate Accident Policy

Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$ 7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for New Ultimate Disability Policy
Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Accident Rates		Sickness Rates	
	Ages 18-60	Ages 61-69	Ages 18-50	Ages 51-55
Class A	\$6.00	\$7.40	\$6.00	\$10.00
Class B	7.20	9.10	6.00	10.00
Class C	8.40	10.80	6.00	10.00
	Ages 18-54	Ages 55-69		
Class D*	10.20	12.70	6.00	10.00
(Rates below for use only in prorating claims)				
Class D	10.20	12.70	-----	-----
Class E	12.00	15.00	-----	-----
Class F	21.00	24.00	-----	-----
Class G	24.00	27.00	-----	-----
Class H	30.00	33.00	-----	-----
Class I	36.00	39.00	-----	-----
Class J	42.00	45.00	-----	-----

Premium Rates for Income Accident Policy Weekly
Indemnity \$5.00

	Ages 18-69
Class A	\$4.00
Class B	4.80
Class C	5.60
Class D*	6.80
(Rates below for use only in proating claims)	
Class D	6.80
Class E	8.00
Class F	14.00
Class G	16.00
Class H	20.00
Class I	24.00
Class J	28.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Income Disability Policy
Weekly Indemnity \$5.00

	Accident Rates	Sickness Rates	
	Ages 18-69	Ages 18-50	Ages 51-55
Class A	\$4.00	\$6.00	\$10.00
Class B	4.80	6.00	10.00
Class C	5.60	6.00	10.00
Class D*	6.80	6.00	10.00

(Rates below for use only in prorating claims)

Class D	6.80	-----	-----
Class E	8.00	-----	-----
Class F	14.00	-----	-----
Class G	16.00	-----	-----
Class H	20.00	-----	-----
Class I	24.00	-----	-----
Class J	28.00	-----	-----

Premium Rates for Majestic Accident Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Accident Policy
Principal Sum \$1500.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$5.00	\$7.10
Class B	6.00	8.85
Class C	7.00	10.60

	Ages 18-54	Ages 55-69
Class D*	8.50	12.25

(Rates below for use only in prorating claims)

Class D	8.50	12.25
Class E	10.00	14.50
Class F	17.50	22.00
Class G	20.00	24.50
Class H	25.00	29.50
Class I	30.00	34.50
Class J	35.00	39.50

Premium Rates for Sterling Life and Limb Policy
Principal Sum \$1000.00

	Ages 18-60	Ages 61-69
Class A	\$3.00	\$4.40
Class B	3.60	5.50
Class C	4.20	6.60

	Ages 18-54	Ages 55-69
Class D*	5.10	7.60

(Rates below for use only in prorating claims)

Class D	5.10	7.60
Class E	6.00	9.00
Class F	10.50	13.50
Class G	12.00	15.00
Class H	15.00	18.00
Class I	18.00	21.00
Class J	21.00	24.00

Filed.....
Effective Sep 21 1931

Defendant's Exhibit No. 2—(Continued)

LOYALTY GROUP

COMMERCIAL CASUALTY INS. CO.

PREMIUM RATES

for

New Ultimate Accident Policy

New Ultimate Disability Policy

Income Accident Policy

Income Disability Policy

Majestic Accident Policy

Star Accident Policy

Stering Life and Limb Policy

LOYALTY GROUP

Filed.....
Effective Aug 1 - 1934

Premium Rates for New Ultimate Accident Policy
Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80
	Ages 18-54	Ages 55-59
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H.....	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for New Ultimate Disability Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Accident Rates		Sickness Rates	
	Ages 18-60	Ages 61-69	Ages 18-50	Ages 51-55
Class A	\$6.00	\$7.40	\$6.00	\$10.00
Class B	7.20	9.10	6.00	10.00
Class C	8.40	10.80	6.00	10.00
	Ages 18-54	Ages 55-69		
Class D*	10.20	12.70	6.00	10.00
(Rates below for use only in prorating claims)				
Class D	10.20	12.70	.....	.....
Class E	12.00	15.00	.....	.....
Class F	21.00	24.00	.....	.....
Class G	24.00	27.00	.....	.....
Class H	30.00	33.00	.....	.....
Class I	36.00	39.00	.....	.....
Class J	42.00	45.00	.....	.....

Premium Rates for Income Accident Policy
Weekly Indemnity \$5.00

Ages 18-69	
Class A	\$4.00
Class B	4.80
Class C	5.60
Class D*	6.80
(Rates below for use only in prorating claims)	
Class D	6.80
Class E	8.00
Class F	14.00
Class G	16.00
Class H	20.00
Class I	24.00
Class J	28.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Income Disability Policy
Weekly Indemnity \$5.00

	Accident Rates Ages 18-69	Sickness Rates Ages 18-50	Sickness Rates Ages 51-55
Class A	\$4.00	\$6.00	\$10.00
Class B	4.80	6.00	10.00
Class C	5.60	6.00	10.00
Class D*	6.80	6.00	10.00

(Rates below for use only in prorating claims)

Class D	6.80	-----	-----
Class E	8.00	-----	-----
Class F	14.00	-----	-----
Class G	16.00	-----	-----
Class H	20.00	-----	-----
Class I	24.00	-----	-----
Class J	28.00	-----	-----

Premium Rates for Majestic Accident Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Accident Policy
Principal Sum \$1500.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$5.00	\$7.10
Class B	6.00	8.85
Class C	7.00	10.60
	Ages 18-54	Ages 55-69
Class D*	8.50	12.25

(Rates below for use only in prorating claims)

Class D	8.50	12.25
Class E	10.00	14.50
Class F	17.50	22.00
Class G	20.00	24.50
Class H	25.00	29.50
Class I	30.00	34.50
Class J	35.00	39.50

Premium Rates for Sterling Life and Limb Policy
Principal Sum \$1000.00

	Ages 18-60	Ages 61-69
Class A	\$3.00	\$4.40
Class B	3.60	5.50
Class C	4.20	6.60
	Ages 18-54	Ages 55-69
Class D*	5.10	7.60

(Rates below for use only in prorating claims)

Class D	5.10	7.60
Class E	6.00	9.00
Class F	10.50	13.50
Class G	12.00	15.00
Class H	15.00	18.00
Class I	18.00	21.00
Class J	21.00	24.00

Defendant's Exhibit No. 2—(Continued)

PREMIUM RATES

for

Star Accident Policy

Star Income Accident Policy

Majestic Accident Policy

Sterling Life and Limb Policy

Simplex Accident Policy

Simplex Disability Policy

Effective December 1st, 1934

The Rates contained herein are to be used by Claim Offices as
a guide in prorating Accident Claims

ACCIDENT AND HEALTH DIVISION

LOYALTY GROUP

COMMERCIAL CASUALTY INS. CO.

Premium Rates for Star Accident Policy

Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Male Risks		Female Risks
	Ages 18-59	Ages 60-69	Ages 18-59
Class A	\$5.00	\$6.40	\$6.00
Class B	6.00	7.90	7.00
Class C	7.00	9.40	8.50
	Ages 18-54	Ages 55-69	Ages 18-54
	8.50	11.00	10.00
Class D*			

(Rates below used only in prorating claims)

Class D	8.50	11.00	10.00
Class E	11.00	14.00	13.00
Class F	13.50	16.50	15.50
Class G	16.00	19.00	18.00
Class H	21.00	24.00	23.00
Class I	26.00	29.00	28.00
Class J	31.00	34.00	33.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Income Accident Policy
\$5.00 Weekly Indemnity

	Male Risks Ages 18-69	Female Risks Ages 18-59
Class A	\$3.00	\$3.60
Class B	3.60	4.20
Class C	4.20	5.10
Class D*	5.10	6.00

(Rates below used only in prorating claims)

Class D	5.10	6.00
Class E	6.60	7.80
Class F	8.10	9.60
Class G	9.50	11.30
Class H	12.35	14.70
Class I	15.30	18.25
Class J	18.30	21.45

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Premium Rates for Majestic Accident Policy
\$5000.00 Principal Sum. \$25.00 Weekly Indemnity
\$500.00 Medical Reimbursement

	Ages 18-59	Ages 60
Class A	\$35.00	\$42.00
Class B	42.00	51.50
Class C	50.00	62.00

	Ages 18-54	Ages 55-69
Class D*	60.00	72.50

(Rates below used only in prorating claims)

Class D	60.00	72.50
Class E	77.00	92.00
Class F	94.50	109.50
Class G	112.00	127.00
Class H	147.00	162.00
Class I	182.00	197.00
Class J	217.00	232.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Sterling Life & Limb Policy
\$5000.00 Principal Sum. \$500.00 Medical Reimbursement

	Male Risks		Female
	Ages 18-59	Ages 60-69	Ages 18-69
Class A	\$23.50	\$30.50	\$20.00
Class B	27.50	37.00	23.00
Class C	32.00	44.00	28.00
	Ages 18-54	Ages 55-69	Ages 18-54
Class D*	37.50	50.00	33.75
(Rates below used only in prorating claim)			
Class D	37.50	50.00	33.75
Class E	51.70	66.70	44.00
Class F	63.45	78.45	54.00
Class G	75.20	90.20	64.00
Class H	98.70	113.70	84.00
Class I	122.20	137.20	104.00
Class J	145.70	160.70	124.00

Rates for Simplex Accident Policy and Accident Portion of
Simplex Disability Policy

\$1000.00 Principal Sum. \$50.00 Monthly Indemnity

	Ages 18-59	Ages 60-69
Class A	\$10.50	\$12.60
Class B	12.60	15.45
Class C	14.70	18.30
	Ages 18-54	Ages 55-69
Class D* & D	17.85	21.60
Class E	21.00	25.50
Class F	26.25	30.75
Class G	31.50	36.00
Class H	42.00	46.50
Class I	52.50	57.00
Class J	63.00	67.50

Business women whose occupations take classes A and B, charge C class rate. All other occupations charge one classification higher than men in the same occupation.

Age limits Female risks 18-59 inclusive.

For maximum limits of Single Principal Sum and/or Single Weekly or Monthly Indemnity for the various classifications refer to our Commercial Division Accident Classification Manual.

(269a)

STAR ACCIDENT POLICY
Annual Premium Rates for Selected Male Risks

Principal Sum	Weekly Ind.	CLASS A		CLASS B		CLASS C		CLASS D*	
		Ages 18-59	Ages 60-65	Ages 18-59	Ages 60-65	Ages 18-59	Ages 60-65	Ages 18-54	Ages 55-65
\$1,000.00	\$ 5.00	\$ 5.00	\$ 6.40	\$ 6.00	\$ 7.90	\$ 7.00	\$ 9.40	\$ 8.50	\$11.00
	10.00	8.00	9.40	9.60	11.50	11.20	13.60	13.60	16.10
	15.00	11.00	12.40	13.20	15.10	15.40	17.80	18.70	21.20
	20.00	14.00	15.40	16.80	18.70	19.60	22.00	23.80	26.30
	25.00	17.00	18.40	20.40	22.30	23.80	26.20	28.90	31.40
	50.00	32.00	33.40	38.40	40.30	44.80	47.20	54.40	56.90
5,000.00	25.00	25.00	32.00	30.00	39.50	35.00	47.00	42.50	55.00
	50.00	40.00	47.00	48.00	57.50	56.00	68.00	68.00	80.50
	75.00	55.00	-----	66.00	-----	77.00	-----	-----	-----
	100.00	70.00	-----	84.00	-----	98.00	-----	-----	-----
10,000.00	50.00	50.00	64.00	60.00	79.00	70.00	94.00	85.00	110.00
	75.00	65.00	-----	78.00	-----	91.00	-----	-----	-----
	100.00	80.00	-----	96.00	-----	112.00	-----	-----	-----
20,000.00	100.00	100.00	-----	120.00	-----	140.00	-----	-----	-----

Limit of risk ages 18-59 inclusive \$20,000.00 P.S. and \$100.00 W.I. Ages 60 or over, \$10,000.00 P.S. and \$50.00 W.I.

Defendant's Exhibit No. 2—(Continued)

STAR ACCIDENT POLICY

Annual Premium Rates for Selected Female Risks

Principal Sum	Weekly Ind.	CLASS A	CLASS B	CLASS C	CLASS D*	
		Ages 18-59	Ages 18-59	Ages 18-59	Ages 18-54	Ages 55-59
\$1,000.00	\$ 5.00	\$ 6.00	\$ 7.00	\$ 8.50	\$10.00	\$13.00
	10.00	9.60	11.20	13.60	16.00	19.00
	15.00	13.20	15.40	18.70	22.00	25.00
	20.00	16.80	19.60	23.80	28.00	31.00
	25.00	20.40	23.80	28.90	34.00	37.00
3,000.00	15.00	18.00	21.00	25.50	30.00	39.00
	20.00	21.60	25.20	30.60	36.00	45.00
	25.00	25.20	29.40	35.70	42.00	51.00
5,000.00	25.00	30.00	35.00	42.50	50.00	65.00

Limit of Risk \$5,000.00 P.S. and \$25.00 Weekly Ind.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

STAR INCOME ACCIDENT POLICY
Annual Premium Rates for Selected Male and Female Risks

Weekly Ind.	MALE RISKS					FEMALE RISKS				
	CLASS A Ages 18-64	CLASS B Ages 18-64	CLASS C Ages 18-64	CLASS D* Ages 18-64	CLASS A Ages 18-59	CLASS B Ages 18-59	CLASS C Ages 18-59	CLASS D* Ages 18-59		
\$ 5.00	\$ 3.00	\$ 3.60	\$ 4.20	\$ 5.10	\$ 3.60	\$ 4.20	\$ 5.10	\$ 6.00		
10.00	6.00	7.20	8.40	10.20	7.20	8.40	10.20	12.00		
15.00	9.00	10.80	12.60	15.30	10.80	12.60	15.30	18.00		
20.00	12.00	14.40	16.80	20.40	14.40	16.80	20.40	24.00		
25.00	15.00	18.00	21.00	25.50	18.00	21.00	25.50	30.00		
30.00	18.00	21.60	25.20	30.60	-----	-----	-----	-----		
35.00	21.00	25.20	29.40	35.70	-----	-----	-----	-----		
40.00	24.00	28.80	33.60	40.80	-----	-----	-----	-----		
45.00	27.00	32.40	37.80	45.90	-----	-----	-----	-----		
50.00	30.00	36.00	42.00	51.00	-----	-----	-----	-----		
60.00	36.00	43.20	50.40	-----	-----	-----	-----	-----		
75.00	45.00	54.00	63.00	-----	-----	-----	-----	-----		
100.00	60.00	72.00	84.00	-----	-----	-----	-----	-----		

Limit of Risk \$100.00 Weekly Indemnity. Limit of Risk \$25.00 Weekly Indemnity. Age 60 or over \$50.00 Weekly Indemnity.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

MAJESTIC ACCIDENT POLICY

Annual Premiums for Selected Male Risks Only

Principal Sum	Weekly Ind.	Medical Reimbursement	CLASS A		CLASS B		CLASS C		CLASS D*	
			Ages 18-59	Ages 60-61	Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-54	Ages 55-64
\$1,000.00	\$ 15.00	\$500.00	\$22.30	\$23.70	\$26.90	\$28.80	\$32.80	\$35.20	\$39.50	\$42.00
	20.00	500.00	25.25	26.65	30.65	32.55	37.30	39.70	45.25	47.75
	25.00	500.00	28.20	29.60	34.40	36.30	41.80	44.20	51.00	53.50
	30.00	600.00	32.20	33.60	39.40	41.30	47.80	50.20	58.50	61.00
	40.00	800.00	40.20	41.60	49.40	51.30	59.80	62.20	73.50	76.00
3,000.00	50.00	1,000.00	48.20	49.60	59.40	61.30	71.80	74.20	88.50	91.00
	15.00	500.00	25.70	29.90	30.70	36.40	36.90	44.10	44.00	51.50
	20.00	500.00	28.65	32.85	34.45	40.15	41.40	48.60	49.75	57.25
	25.00	500.00	31.60	35.80	38.20	43.90	45.90	53.10	55.50	63.00
	30.00	600.00	35.60	39.80	43.20	48.90	51.90	59.10	63.00	70.50
5,000.00	40.00	800.00	43.60	47.80	53.20	58.90	63.90	71.10	78.00	85.50
	50.00	1,000.00	51.60	55.80	63.20	68.90	75.90	83.10	93.00	100.50
	25.00	500.00	35.00	42.00	42.00	51.50	50.00	62.00	60.00	72.50
	50.00	1,000.00	55.00	62.00	67.00	76.50	80.00	92.00	97.50	110.00
	75.00	1,500.00	75.00	-----	92.00	-----	110.00	-----	-----	-----
10,000.00	100.00	2,000.00	95.00	-----	117.00	-----	140.00	-----	-----	-----
	50.00	1,000.00	63.50	77.50	76.50	95.50	90.25	111.25	108.75	133.75
	75.00	1,500.00	83.50	-----	101.50	-----	120.25	-----	-----	-----
20,000.00	100.00	2,000.00	103.50	-----	126.50	-----	150.25	-----	-----	-----
	100.00	2,000.00	120.50	-----	145.50	-----	170.75	-----	-----	-----

Limit of risk \$20,000.00 P.S. \$100.00 Weekly Ind. and \$2,000.00 medical reimbursement. Age 60 or over
 \$10,000.00 P.S., \$50.00 W.I. and \$1,000.00 medical reimbursement.

Defendant's Exhibit No. 2—(Continued)

STAR HEALTH POLICY

For Selected Male Risks Only (Age limits—18-55 inclusive)

POLICY PAYS:

For total disability from disease, beginning with the fifteenth day of disability, limit 52 weeks. House confinement not required.

Hospital and/or Graduate Nurses' Fees of 50% of weekly indemnity in addition to other indemnities; limit 20 weeks. Hospital and/or Nurses' Fees payable from first day if totally disabled 15 days or more.

Surgical operation fees according to liberal schedule in Policy. (Payable in addition to other indemnities.)

Annual Cost for each \$5.00 Weekly Indemnity

	Ages	Ages
	18-50	51-55
Class A, B, C, D*	\$6.00	\$9.50

(Limit of Risk \$100.00 Weekly Indemnity.)

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

STERLING LIFE AND LIMB POLICY

Annual Premium Rates for Selected Male Risks

Principal Sum	Medical Reim- bursement	CLASS A		CLASS B		CLASS C		CLASS D*	
		Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-54	Ages 55-64
\$5,000.00	\$ 500.00	\$23.50	\$30.50	\$27.50	\$37.00	\$32.00	\$44.00	\$37.50	\$50.00
	1,000.00	28.50	35.50	33.50	43.00	39.00	51.00	46.00	58.50
	2,000.00	38.50	45.50	45.50	55.00	53.00	65.00	63.00	75.50
10,000.00	1,000.00	42.00	56.00	49.00	68.00	56.75	80.75	66.25	91.25
	2,000.00	52.00	.....	61.00	.....	70.75	.....	83.25	.....
15,000.00	1,500.00	60.50	.....	70.50	.....	81.50	.....	95.00	.....
	2,000.00	65.50	.....	76.50	.....	88.50	.....	103.50	.....
20,000.00	2,000.00	79.00	.....	92.00	.....	106.25	.....	123.75	.....

Limit of risk \$20,000.00 P.S. and \$2,000.00 medical reimbursement. Age 60 or over, \$10,000.00 P.S. and \$1,000.00 medical reimbursement.

Defendant's Exhibit No. 2—(Continued)

STERLING LIFE AND LIMB POLICY

Annual Premium Rates for Selected Female Risks

Principal Sum	Medical Reim- bursement	CLASS A	CLASS B	CLASS C	CLASS D*	
		Ages 18-59	Ages 18-59	Ages 18-59	Ages 18-54	Ages 55-59
\$1,000.00	\$500.00	\$16.00	\$19.00	\$23.00	\$27.75	\$30.25
2,000.00	500.00	17.00	20.00	24.25	29.25	34.25
3,000.00	500.00	18.00	21.00	25.50	30.75	38.25
4,000.00	500.00	19.00	22.00	26.75	32.25	42.25
5,000.00	500.00	20.00	23.00	28.00	33.75	46.25

Limit of risk \$5,000.00 P.S. and \$500.00 medical reimbursement.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

SIMPLEX ACCIDENT POLICY

Rates for Male and Female Ages 18-59 inc.

Class	Principal Sum (Single)	Accident Monthly Indemnity					
		50.00	60.00	75.00	100.00	125.00	150.00
Class	\$1,000.00	\$17.85	\$20.65	\$24.85	\$31.87	\$38.88	\$45.90
D	2,000.00	21.67	24.48	28.68	35.70	42.70	49.72
	3,000.00	.....	28.30	32.50	39.52	46.53	53.55
Class	500.00	18.75	22.05	27.00	.....	.....	.....
E	1,000.00	21.00	24.30	29.25	.....	.....	.....
	2,000.00	25.50	28.80	33.75	.....	.....	.....
Class	500.00	23.43	27.55	33.75	.....	.....	.....
F	1,000.00	26.25	30.37	36.55	.....	.....	.....
	1,500.00	29.05	33.18	39.37	.....	.....	.....
Class	500.00	28.12	33.75	.....	.....	.....	.....
G	750.00	29.79	34.74	.....	.....	.....	.....
	1,000.00	31.50	36.45	.....	.....	.....	.....
Class	500.00	37.50	.....	.....	.....	.....	.....
H							

Business Women charge one classification higher than men in the same occupation.

For Ages 55-64—In addition to the above premiums add the following premiums for each \$1,000.00 Principal Sum. Class D \$3.75, E, F, G, H \$4.50.

For semiannual premium use 51% of annual premium.

For quarterly premium use 26% of annual premium.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

RATES FOR SIMPLEX DISABILITY POLICY

Ages 18 to 50

Class	Principal Sum (Single)	Accident and Sickness Monthly Indemnity					
		50.00	60.00	75.00	100.00	125.00	150.00
Class	\$1,000.00	\$21.00	\$24.75	\$30.40	\$39.75	\$49.15	58.50
A	2,000.00	23.25	27.00	32.65	42.00	51.40	60.75
	3,000.00	.....	29.25	34.90	44.25	53.65	63.00
	5,000.00	.....	.....	.....	48.75	58.15	67.50
Class	1,000.00	25.20	29.68	36.45	47.70	58.95	70.20
B	2,000.00	27.90	32.38	39.15	50.40	61.65	72.90
	3,000.00	.....	35.08	41.85	53.10	64.35	75.60
	5,000.00	.....	.....	.....	58.50	69.75	81.00
Class	1,000.00	29.40	34.66	42.55	55.65	68.74	81.90
C	2,000.00	32.55	37.81	45.70	58.80	71.89	85.05
	3,000.00	.....	40.96	48.85	61.95	75.04	88.20
	4,000.00	.....	.....	.....	65.10	78.19	91.35
	5,000.00	.....	.....	.....	68.25	81.34	94.50
Class	1,000.00	35.72	42.05	51.95	67.57	83.50	99.47
D*	2,000.00	39.55	45.88	55.78	71.40	87.33	103.30
and D	3,000.00	.....	49.71	59.61	75.23	91.16	107.13
Class	500.00	39.75	47.25	58.74	.....	.....	.....
E	1,000.00	42.00	49.50	60.99	.....	.....	.....
	2,000.00	46.50	54.00	65.49	.....	.....	.....
Class	500.00	49.69	59.09	73.11	.....	.....	.....
F	1,000.00	52.51	61.91	75.93	.....	.....	.....
	1,500.00	55.32	64.72	78.74	.....	.....	.....
Class	500.00	62.02	71.01	.....	.....	.....	.....
G	750.00	63.71	72.70	.....	.....	.....	.....
	1,000.00	65.40	74.39	.....	.....	.....	.....
Class	500.00	64.20	.....	.....	.....	.....	.....
H							

Business women whose occupations take classes A and B, charge class C rate.

Defendant's Exhibit No. 2—(Continued)

All other occupations charge one classification higher than men in the same occupation.

For ages 51 to 59 inclusive premium increases 50%.

For ages 55-59—In addition to the above premiums add the following premiums for each \$1,000.00 Principal Sum. Class D* and D \$3.75, E, F, G, H \$4.50.

For semi-annual premium use 51% of annual premium.

For quarterly premium use 26% of annual premium.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

[Endorsed]: Filed August 24, 1945.

[Title of Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 15th day of June, 1945, before the Honorable L. B. Schwel-lenbach, Judge of the above entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Hal- verson and June Fowles, and the defendant, Com- mercial Casualty Insurance Company, a New Jer- sey Corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heard the evidence submitted and the arguments of counsel and being fully advised in the premises, makes the following

FINDINGS OF FACT:

1.

This action was brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274 of the Judicial Code; 28 USCA Sec. 400).

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant.

5.

That the parties hereto stipulated in Open Court to the waiving of a jury.

6.

That heretofore and on or about the 4th day of May, 1937, in consideration of the payment in advance of a semi-annual [132] premium of \$10.20 by the plaintiff to the defendant herein, said defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, through its officers and agents thereunto duly authorized, duly issued, executed and

delivered to the plaintiff herein, Leslie O. Fowles, its life and accident policy, towit: Star Accident Policy No. 14H, being form Cas. A. & H. No. 5643, which said policy was introduced in evidence in the above entitled case and is marked Plaintiff's Exhibit, and said policy is hereby referred to and by reference made a part hereof as though fully set forth herein. That all premiums due on said policy from the plaintiff to the defendant have been duly and timely paid. That said insurance policy has been at all times herein mentioned in full force and effect.

7.

That said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability. The provision in said policy pertaining to total disability is as follows:

"Schedule II. Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of accident cause continuous total disability, and prevent the insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability."

8.

That the policy further contained the following provision relative to hospitalization benefits.

“Schedule VIII. If the injury to the insured shall entitle him to weekly indemnity under the terms of this policy and within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to the indemnity otherwise provided for a period of not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount [133] insurance except as it may be modified by the Company’s classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

“If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall

mean only as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable."

The defendant asserted that under the above provisions said policy was limited because of the change of occupation to one more hazardous and that the benefits should be reduced thereby. Defendant alleged that plaintiff changed his occupation from that of mail carrier (city on foot) classified as "Class B," to that of officer in the United States Army, classified as "Class K," and that because of such change of occupation the defendant was obliged to pay to the plaintiff a sum not in excess of \$5.00 per week while the plaintiff was confined to the Hahne-mann Hospital together with a sum not in excess of 5.00 per week during the period when the plaintiff was totally disabled, up to the time of trial.

The plaintiff denied that he had changed his occupation and alleged that his military service was temporary and that he expected to return to the postal service when he was released from the Army.

14.

That the defendant filed the Star Accident Policy with the State Commissioner of Insurance of the State of Washington on....., and properly filed its classification of risks and premium rates pertaining to the said [134] for hos-

pital expense but not exceeding per week the amount payable hereunder as single weekly indemnity.”

9.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington, that at the said time, plaintiff was, and had been for a number of years, a member of the Washington National Guard; that the Washington National Guard was mobilized in 1941, and later made a part of the army of the United States.

10.

That on or about the 14th day of April, 1943, at or about the hour of 7:30 o'clock A. M. plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was injured in an accidental collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident and of the fact that he was disabled and confined to a hospital and under medical care.

12.

It was stipulated by and between the plaintiff and the defendant at the time of the trial, that due to plaintiff's injury in said accident, that the plaintiff had been continuously and totally disabled from

April 14, 1943, the date of the accident, to June 15, 1945, the date of the trial. The court further finds that the plaintiff was confined for four and one-half weeks in the Hahnemann Hospital, a civilian hospital in Philadelphia, Pennsylvania.

13.

Section I of the "Standard Provisions" of said policy of insurance reads as follows:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of [135] policy with the Commissioner of Insurance of the State of Washington.

15.

That the defendant has tendered to the plaintiff the amount which it alleges is due under the terms of the policy but that such tender has been refused. That there is due and owing under said policy the sum of \$25.00 per week, commencing with the 21st day of April, 1943, and 25.00 for each week thereafter, up to June 15, 1945, together with interest. That there is due the sum of \$25.00 per week for the four and one-half weeks that the plaintiff was in the Hahnemann Hospital.

From the foregoing Findings of Fact, the court makes the following

CONCLUSION OF LAW

1.

That the defendant is indebted to and required to pay to the plaintiff the sum of \$25.00 per week from April 21, 1943, to June 15, 1945.

2.

That the defendant is indebted and required to pay to the plaintiff the sum of \$25.00 per week for the four and one-half weeks the plaintiff was in the Hahnemann Hospital.

Done in Open Court this.....day of June, 1945.

.....,

United States Judge.

Presented & Refused—June 22, 1945.

L. B. SCHWELLENBACH,
Judge.

Copy received 6/22/45.

JUNE FOWLES,
C. W. HALVERSON,
Atty. for Pltf.

[Endorsed]: Filed Jun. 22, 1945. [136]

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[Title of Court and Cause.]

PROPOSED JUDGMENT

This cause coming on regularly for trial, June 15, 1945, before the Honorable L. B. Schwellenbach, Judge of the above entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, the Commercial

Casualty Insurance Company, a New Jersey Corporation, appearing by its Attorneys, Ryan, Askren & Mathewson, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of \$25.00 per week for each week commencing April 21, 1943, to June 15, 1945.

It Is Further Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of \$112.50 for hospital expenses while confined in Hahnemann Hospital, Philadelphia, Pennsylvania.

Done in Open Court this.....day of June, 1945.

.....

Presented by

RYAN, ASKREN &
MATHEWSON,

Copy received 6/22/45.

JUNE FOWLES,
C. W. HALVERSON.

Refused June 22, 1945.

L. B. SCHWELLENBACH,
United States Judge.

[Endorsed]: Filed Jun. 22, 1945. [137]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This Cause came on regularly for trial on the 15th day of June, 1945, before Honorable L. B. Schwellenbach, Judge of the above-entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heard the evidence submitted and the arguments of counsel and being fully advised in the premises, makes the following

FINDINGS OF FACT:

1.

This action was brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274 of the Judicial Code; 28 USCA Sec. 400.)

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general [138] life, health and accident insurance business, and is duly admitted and

licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant. The value of the plaintiff's rights in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs, as will more fully hereinafter appear.

5.

That the parties hereto stipulated in Open Court to the waiving of a jury.

6.

That heretofore and on or about the 4th day of May, 1937, in consideration of the payment in advance of a semi-annual premium of \$10.20 by the plaintiff to the defendant herein, said defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, through its officers and agents thereunto duly authorized, duly issued, executed and delivered to the plaintiff herein, Leslie O. Fowles, its life and accident policy, towit: Star Accident Policy No. 14H, being form Cas. A. & H. No. 5643, which said policy was introduced in evidence in the above entitled case and is marked Plaintiff's Exhibit A, and said policy is hereby referred to and by reference made a part hereof as though fully set forth herein. That all premiums due on said policy from the plaintiff to the defendant have been duly and timely paid. That said insurance policy has been at all times herein mentioned in full force and effect.

7.

That said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should [139] prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability. The provision in said policy pertaining to total disability is as follows:

“Schedule II. Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of accident cause continuous total disability, and prevent the insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability.”

8.

That said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability necessitated treatment and residence in a hospital, defendant would pay for such treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding fifteen consecutive weeks, the amount of hospital expense to the extent of \$25.00 weekly. The hospitalization indemnity provision is as follows:

“Schedule VIII. If such injury to the insured shall entitle him to weekly indemnity under the terms of this policy and within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to the indemnity otherwise provided for a period of not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount for hospital expense but not exceeding per week the amount payable hereunder as single weekly indemnity.”

9.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington; that at the time, plaintiff was, and [140] had been for a number of years, a member of the Washington National Guard; that the Washington National Guard was mobilized in 1941, and later made a part of the army of the United States, all of which facts were known to defendant's agent, Bader.

10.

That on or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was injured in an acciden-

tal collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident, of the fact that he was disabled and confined to a hospital and under medical care.

12.

It was stipulated by and between the plaintiff and defendant at the time of trial, that due to plaintiff's injuries in said accident, that plaintiff has been continuously and totally disabled from the date of the accident, April 14, 1943, to the present time; that said stipulation was entered into with the understanding that it was not to limit and restrict plaintiff's total disability to the period of time between the date of said accident and the present time, and said stipulation does not limit in any way the period of such total disability as to the future. That plaintiff has been prevented by the injuries incurred in said accident from performing any duties of his occupation or any occupation since the date of said accident, that as a result of said accident and the injuries resulting therefrom, plaintiff has been confined in hospitals for a period of approximately eighteen months, four and one-half weeks of which time plaintiff was hospitalized in the Hahnemann Hospital, a civilian hospital in Philadelphia, Pennsylvania.

13.

That at the time of said accident, April 14, 1943, [141] plaintiff had a life expectancy of 29.62 years,

and the benefits accrued and to accrue in the future, to plaintiff from defendant, will exceed the sum of \$3,000.00 exclusive of interests and costs.

14.

That an actual controversy and dispute existed between the plaintiff and defendant as to the meaning and construction of said policy of insurance and the value of plaintiff's rights were affected thereby.

Section I of the "Standard Provisions" of said policy of insurance reads as follows:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

"If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and

classification of risks mentioned in this policy shall mean only as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable."

Defendant asserted that under the above provision said policy was limited by a change of occupation to one more hazardous and the benefits would be reduced to a portion of the indemnities specified in the policy, and alleged that the [142] plaintiff changed his occupation from that of mail carrier (city on foot—Class B) to that of officer in the United States Army, classified as "class K," and that because of such change of occupation defendant was only obligated to pay to the plaintiff on account of said accidental injuries, a sum not in excess of \$5.00 per week while the plaintiff was confined to Hahnemann Hospital together with sum not in excess of \$5.00 per week during the period which plaintiff was totally disabled from the injury up to the limit specified in the policy.

The plaintiff denied that he had changed his occupation, asserting that he was on temporary leave from the post office department during military service in the army of the United States, that he intended to return to his employment in the Olympia post office, and that during nearly eighteen years employment in the post office he had contrib-

uted a percentage of his salary each month toward the purchase of a retirement annuity, and that he did not withdraw the funds paid toward the purchase of such annuity when he obtained leave of absence from the post office at the time the Washington National Guard was mobilized. Plaintiff also maintained that he was doing no act nor thing pertaining to any occupation at the time of his accident but was engaged in recreation during a furlough.

15.

That defendant filed form Cas. A. & H. 5643 of Star Accident Policy No. 14H with the State Commissioner of Insurance of the State of Washington on June 3, 1931 but failed to file its classification of risks pertaining to said policy with said commissioner of insurance at the time of filing said form or at any time as provided by the statutes and the Law of the State of Washington. The law and statutes of the State of [143] Washington provide that in the event such filing is not made that the policy shall be fully enforceable according to its terms and conditions.

16.

At no time has defendant paid or tendered to the plaintiff any sum or sums whatsoever due to the plaintiff under said policy, although said plaintiff was and now is continuously and totally disabled from the date of said accident due to injuries received therein, and unable to perform any work for compensation or profit. That there is due and owing and unpaid from the defendant to the plaintiff the

sum of Twenty-five (\$25.00) dollars per week commencing on the 21st day of April, 1943, and Twenty-five (\$25.00) dollars for each week thereafter until the date hereof, together with interest thereon at the rate of six per cent (6%) per annum from the due date of each weekly payment of \$25.00 until paid; and there is due, owing and unpaid from the defendant to the plaintiff for hospital expenses the sum of \$25.00 per week from April 14, 1943, to May 15, 1943, together with interest thereon at the rate of 6% per annum from May 15, 1943, until the date hereof.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

That plaintiff is entitled to judgment declaring plaintiff's rights under Star Accident Policy No. 14H, form Cas A. & H. 5643, issued by the defendant, the Commercial Casualty Insurance Company, a New Jersey Corporation, to the plaintiff herein, and that plaintiff is entitled to judgment against defendant as follows:

1.

That no classification of risks pertaining to said [144] policy has been filed by the defendant with the State Insurance Commissioner of the State of Washington as provided by the law and statutes of the State of Washington, which would in any way limit or reduce the indemnity provided in said policy, and said policy is declared to be in full force and effect in all respects.

2.

That defendant is indebted and required to pay to the plaintiff the amount of \$25.00 per week as weekly indemnity from April 21, 1943, for the period of total disability of the plaintiff, together with interest at the rate of 6% per annum from the due date of each installment of weekly indemnity until paid.

3.

That defendant is indebted and required to pay to the plaintiff the amount of \$112.50 as hospitalization indemnity for the four and one-half weeks in Hahnemann Hospital, together with interest thereon at the rate of 6% from May 15, 1943, until paid.

4.

That plaintiff recover costs and disbursements herein expended and incurred.

Done in Open Court this 22 day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff

[Endorsed]: Filed June 22, 1945. [145]

In the United States District Court In and For the
Eastern District of Washington, Southern
Division

Civil No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey Corporation,
Defendant.

JUDGMENT

This Cause coming on regularly for trial, June 15, 1945, before the Honorable L. B. Schwellenbach, Judge of the above entitled court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, the Commercial Casualty Insurance Company, a New Jersey corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises,

It is hereby Ordered, Adjudged, Declared and Decreed, that the plaintiff's rights under Star Accident Policy No. 14H, form Cas. A. & H. 5643, issued by defendant company to plaintiff are not limited nor restricted; that no classification of risks pertaining to said policy has been filed by the defendant with the State Insurance Commissioner of

the State of Washington as provided by the law and statutes of the State of Washington, which would in any way limit or reduce the indemnity provided in said policy, and the plaintiff is entitled to full benefits thereunder as set forth therein, and said policy is [146] declared to be in full force and effect in all respects.

It is hereby Ordered, Adjudged, Declared and Decreed, that defendant is required to pay to the plaintiff the amount of \$25.00 per week as weekly indemnity from April 21, 1943, for the period of total disability of the plaintiff.

It is further Ordered, Adjudged, Declared and Decreed, that the plaintiff have and recover judgment against the defendant, the Commercial Casualty Insurance Company, a New Jersey Corporation in the sum of \$25.00 per week for each week commencing April 21, 1943, to June 15, 1945, together with interest on each of said weekly indemnity payments of \$25.00 from the due date thereof until paid.

It is further Ordered, Adjudged, Declared and Decreed that defendant is indebted and required to pay to the plaintiff the amount of \$112.50 as hospitalization indemnity for the four and one-half weeks in Hahnemann Hospital, and that plaintiff have and recover judgment against the defendant for said hospitalization indemnity in the amount of \$112.50 while confined in Hahnemann Hospital, Philadelphia, Pennsylvania, a civilian hospital, together with interest thereon from the due date until paid.

It is further Ordered, Adjudged, Declared and Decreed that plaintiff recover costs and disbursements herein expended and incurred.

Done in Open Court this 22 day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1945. [147]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant by its attorneys, Ryan, Askren & Mathewson, and respectfully petitions the Court to grant a new trial on the following grounds:

1. Irregularity in the proceedings of the Court and abuse of discretion by which the defendant was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of evidence to justify the decision, in that there was no competent evidence produced at the trial indicating that the classification of hazards and premium rates had not been prop-

erly filed with the Commissioner of Insurance of the State of Washington.

5. Error in law occurring at the trial in that the court decided the litigation on the authority of the case of [148] *Nordin vs. Commercial Casualty Company*, which case was not first served upon counsel, in violation of Rule 9B of the Rules of the District Court of the United States, Eastern District of Washington, and error in excluding testimony that the defendant had properly complied with the requirements of the statutes of the State of Washington and the State Commissioner of Insurance relative to filing of classification of risks and premium rates.

6. Error in the holding of the court that the defendant had not properly filed its classification of risks because this classification was not physically attached to the schedule of premium rates filed with the Star Accident Policy.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON

Attorneys for Defendant,

Commercial Casualty Co.

Copy received and service accepted this 22nd June, 1945, of the foregoing motion for new trial.

JUNE FOWLES

C. W. HALVERSON

Attys. for Pltf.

[Endorsed]: Filed June 22, 1945. [149]

[Title of Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter came on duly and regularly for hearing before the Hon. L. B. Schwellenbach, this 22nd day of June, 1945, on the motion of the defendant for a new trial, the plaintiff appearing by his attorneys, June Fowles and C. W. Halverson, and the defendant appearing by its attorneys, Ryan, Askren and Mathewson and William J. Madden, of counsel, and it appearing to the court that findings of fact and conclusions of law and judgment in the above entitled cause have previously been signed and entered, and the court having previously ordered arguments upon said motion, and there being no objection, now therefore,

It is Hereby Ordered that said defendant's motion for a new trial be and the same is hereby denied, to all of which the defendant excepts, and its exception is hereby allowed.

Done in open court this 22nd day of June, 1945.

L. B. SCHWELLENBACH

Judge.

Presented by:

JUNE FOWLES

C. W. HALVERSON

O. K. as to form:

WILLIAM J. MADDEN

of Counsel for deft.

[Endorsed]: Filed June 22, 1945. [150]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Commercial Casualty Insurance Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 22nd of June, 1945.

RYAN, ASKREN, MATHEWSON
Attorneys for Appellant, Commercial Casualty Insurance Company

Copy of this notice mailed to C. W. Halverson and June Fowles, Attorneys for Plaintiff, July 26, 1945.

A. A. LaFRAMBOISE,
Clerk

[Endorsed]: Filed July 25, 1945. [151]

[Title of Court and Cause.]

COST AND SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Commercial Casualty Insurance Company, as principal and The Metropolitan Casualty Insurance Company of New York, as sureties, are held and firmly bound unto Leslie O. Fowles in the full and just sum of \$4,200.00 to be paid to the said

Leslie O. Fowles his attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23 day of July in the year of our Lord One Thousand Nine Hundred and Forty-five.

Whereas, lately at a District Court of the United States for the Eastern District of Washington, Southern Division, in a suit *depending* in said Court, between Leslie O. Fowles, Plaintiff, and Commercial Casualty Insurance Company, Defendant, a judgment was rendered against the said Defendant and the said Defendant having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid suit, being an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Commercial Casualty Insurance Company shall prosecute its appeals to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fail to make its plea good, then the above obli-

gation to be void; else to remain in full force and virtue.

COMMERCIAL CASUALTY
INSURANCE COMPANY,
a New Jersey Corporation

[Seal] By ARMAND KELLER
Attorney-in-fact. [152]

THE METROPOLITAN CASU-
ALTY INSURANCE COM-
PANY of New York

[Seal] By KEITH D. FISK
Attorney-in-fact.

Approved this 30th day of July, 1945.

LLOYD L. BLACK

United States District Judge.

[Endorsed]: Filed July 30, 1945. [153]

[Title of Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD OF APPEAL

To the Clerk of the United States District Court:

Comes now the appellant, by its attorneys, Ryan, Askren & Mathewson, and designates the following pleadings which it wishes prepared for transmission to the Circuit Court of Appeals in connection with Appeal heretofore filed in this cause:

1. Plaintiff's Original Complaint

2. Motion and Affidavit to Quash Summons and Service thereof.
3. Plaintiff's Amended Complaint.
4. Motion to Quash Amended Complaint and service thereof.
5. Opinion of Court on Defendant's Motion to Quash Amended Complaint.
6. Order Denying Defendant's Motion to Dismiss and Quash.
7. Defendant's Answer.
8. Plaintiff's Reply.
9. Reporter's Transcript of Evidence.
10. Defendant's Proposed Findings of Fact, Conclusions of Law, and Judgment.
11. Court's Memorandum Opinion.
12. Findings of Fact and Conclusions of Law.
13. Defendant's Motion for New Trial.
14. Order Denying Motion for New Trial.
15. Judgment.
16. Notice of Appeal.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON
Attorneys for Appellant

Service accepted and copy received of Appellant's Designation of Contents of Record on Appeal.

Dated August 18, 1945.

C. W. HALVERSON
Attorney for Respondent

[Endorsed]: Filed Aug. 20, 1945. [154]

[Title of Court and Cause.]

APPELLANT'S AMENDED DESIGNATION
OF CONTENTS OF RECORD OF APPEAL

To the Clerk of the United States District Court:

Comes now the appellant, by its attorneys, Ryan, Askren & Mathewson, and designates the following additional exhibits which it wishes prepared for transmission to the Circuit Court of Appeals in connection with Appeal heretofore filed in this cause:

1. Plaintiff's exhibit D, the 1929 Manual of Risks.
2. Defendant's Exhibit 1, the 1932 Manual of Risks.
3. Defendant's Exhibit 2, documents contained in envelope.
4. This notice and the appellant's original designation of record for appeal.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON

Attorneys for Appellant

Copy received 8/23/45.

C. W. HALVERSON

Atty. for Pltf.

[Endorsed]: Filed Aug. 24, 1945. [155]

[Title of Court and Cause.]

ORDER

On the oral application of William J. Madden, of attorneys for the Defendants for an order directing the Clerk to transmit Plaintiff's Exhibit "D" with

the record on appeal in said cause and for an extension of ten days in which to prepare and transmit the record on appeal, and June Fowles appearing as attorney for the plaintiff and making no objection to said application,

It Is Hereby Ordered that said application be and the same is hereby granted and the Clerk of this Court is hereby directed to transmit to the United States Circuit Court of Appeals the original exhibit Plaintiff's Exhibit "D" and

It Is Further Ordered that the time to prepare and transmit the record on appeal to the United States Circuit Court of Appeals be and it is hereby extended for the period of ten (10) days.

Done in open Court this 30th day of August, 1945.

CHARLES H. LEAVY

United States District Judge

Approved:

JUNE FOWLES

Attorney for Plaintiff-

Appellee

[Endorsed]: Filed Aug. 30, 1945. [156]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Wash-

ington, do hereby certify that the foregoing typewritten pages and printed pamphlet (numbered one to 157, inclusive) are full, true and correct copies of the record and files in the above entitled cause necessary to the hearing of the appeal thereof in the United States Circuit Court for the Ninth Circuit, at San Francisco, pursuant to the Notice of Appeal filed in said cause by the appellant, and as called for by the Praecipe for Transcript of Record on Appeal, filed by appellant on July 25, 1945, as the same remain on file and of record in the office of the clerk of said court, and that the same, together with the original of Plaintiff's Exhibit "D," constitute the record on said appeal.

I further certify that pursuant to order of the District Court I am transmitting herewith the Original Plaintiff's Exhibit "D."

I further certify that the fees of the clerk of the above entitled court for preparing and certifying said record on appeal amount to the sum of \$36.70, and that said sum has been paid in full to me by Ryan, Askren & Mathewson, counsel for appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the Eastern District of Washington, at Spokane, in said District, this 10th day of September, 1945.

[Seal]

A. A. LaFRAMBOISE

Clerk [157]

[Endorsed]: No. 11139. United States Circuit Court of Appeals for the Ninth Circuit. Commercial Casualty Insurance Company, a New Jersey Corporation, Appellant, vs. Leslie O. Fowles, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 13, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11139

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
Appellant,

vs.

LESLIE O. FOWLES,

Appellee.

STATEMENT OF POINTS

1. United States District Court did not have jurisdiction of the case or subject matter inasmuch as the jurisdictional amount of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, was not involved. Title 28, Section 41, U.S.C.A., sets forth the required jurisdictional amount neces-

sary for suits in the District Court, and the plaintiff's complaint, as well as the evidence, indicates that this amount was not involved in the case at bar.

2. The plaintiff's original complaint on its face indicated that the amount involved was less than Three Thousand Dollars (\$3,000.00), and the Court was in error in not holding that the plaintiff was bound by the said allegations therein contained, and was in error in not dismissing the action.

3. The lower Court was in error in calculating speculative future damages of the plaintiff, and, using such speculative damages as a basis, erred in making a finding that the amount in controversy exceeded the jurisdictional minimum.

4. There was no evidence introduced at the trial relating to the life expectancy of the plaintiff, and the lower Court was in error in making a finding of fact that the plaintiff had a life expectancy of 29.62 years.

5. The lower Court was in error in granting speculative future damages which had not accrued at the time of the trial and which were not certain to accrue in the future.

6. That there was a question as to the amount due to the plaintiff in view of his alleged change of occupation, but there was no question involved calling for an interpretation of the policy or its terms, and the lower Court was in error in holding as a fact that there was a dispute as to the meaning and construction of the policy.

7. That the requirements of Rem. Rev. Stat., Section 7233, have been complied with by the de-

fendant company, and that the District Court was in error in deciding the case in favor of the plaintiff, on the ground that the defendant had failed to file a proper classification of risks.

WILLIAM J. MADDEN

Of Ryan, Askren & Mathewson, Attorneys for
Appellant

Service accepted and copy received this 28th day
of August, 1945.

C. W. HALVERSON

Attorney for Appellee

[Endorsed]: Filed September 1, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herewith designates the whole record and all of the evidence as necessary for the consideration of the Statement of Points heretofore filed in this cause.

RYAN, ASKREN, MATHEWSON

Of Ryan, Askren & Mathewson, Attorneys for
Appellant

Copy served on C. W. Halverson, attorney for
appellee, Aug. 27, 1945.

W. J. MADDEN

of Counsel for Appellant

[Endorsed]: Filed September 4, 1945. Paul P.
O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY,
a New Jersey corporation, *Appellant,*

vs.

LESLIE O. FOWLES, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

WILLIAM J. MADDEN,
RYAN, ASKREN & MATHEWSON,
Attorneys for Appellant.

545 Henry Building,
Seattle 1, Washington.

FILED

NOV 24 1945

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY,
a New Jersey corporation, *Appellant,*

vs.

LESLIE O. FOWLES, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

WILLIAM J. MADDEN,
RYAN, ASKREN & MATHEWSON,
Attorneys for Appellant.

545 Henry Building,
Seattle 1, Washington.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation,	<i>Appellant,</i>	}	No. 11139
vs.			
LESLIE O. FOWLES,	<i>Appellee.</i>		

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

1. The Parties

The action was brought in the court below by Leslie O. Fowles, who will be referred to as the plaintiff or appellee, against the Commercial Casualty Insurance Company, who will be referred to as the defendant or appellant. The action was brought under the provisions of Section 274d of the Judicial Code, 28 U.S.C.A., Section 400.

2. Statement of Facts and Issues of the Case

On or about the 4th day of May, 1937, the plain-

tiff was issued an accident insurance policy by the defendant company. The said policy was issued after an application therefor had been made to the defendant company wherein the plaintiff listed his occupation as that of a mail carrier on foot in the City of Olympia, Washington. The application setting forth the occupation of the plaintiff was attached to and made a part of the accident insurance policy. By the terms of the policy the defendant company was to pay to the plaintiff the sum of \$25.00 per week and certain hospital benefits, in the event that the plaintiff was accidentally injured during the life of the policy. There was a further provision in the contract of insurance covering a change of occupation and referring to the defendant's classification of risks, which provision provided that in the event of a change of occupation, the insured could recover only the amount which the premium paid would have bought in the more hazardous occupation. The plaintiff, at the time the policy was taken out, was a member of the Washington National Guard, though this fact was not called to the attention of the insuring company. On or about the 3rd of February, 1941, the plaintiff was mobilized into the Army of the United States with the rank of captain and he subsequently became a lieutenant colonel. On or about the 14th of April, 1943, the plaintiff was injured while driving a motor vehicle in the City of Philadelphia and he subsequently brought the present action claiming total disability from the time of the said accident and alleging that he should be paid the full indemnity set forth in the policy, namely, \$25.00 per week, plus

certain hospital bills. The plaintiff's original complaint was filed in court on October 11, 1944, and merely prayed that the plaintiff be given the weekly indemnity set forth in the policy plus his hospital and nursing expenses and prayed judgment in the total sum of \$2,100.00. The defendant by its attorneys made a motion to quash the summons and service thereof and supported this motion by an affidavit. Thereafter on the 16th day of January, 1945, the plaintiff filed an amended complaint wherein he pleaded that there was due him the sum of \$2,575.00 and further alleged that the future rights of the plaintiff had a value in excess of \$3,000.00. The defendant moved to quash the amended complaint and service thereof on the ground that the jurisdictional amount was not involved and that this fact appeared on the face of the complaint. This motion was based on the affidavit of William J. Madden. The motion, which the court considered as a motion to dismiss, was argued to the court and the Honorable L. B. Schwellenbach, Judge of the District Court of the United States for the Eastern District of Washington, overruled the defendant's motion by a memorandum opinion dated April 2, 1945. This memorandum opinion is found on page 39 of the Transcript of Record. An order overruling the Motion to Dismiss was entered on the 11th day of April, 1945.

Thereafter the defendant answered the complaint alleging that the jurisdictional amount necessary for a Federal Court action was not involved and further setting up the defense that the plaintiff had changed his occupation to one more hazardous than that set

forth in his application, without notification to the defendant company, and alleging that by virtue of such change the plaintiff was entitled to a weekly indemnity not to exceed \$5.00. This for the reason that a mail carrier on foot is listed in the company's classification of risks as Class B, whereas a commissioned officer in the Army or Navy is listed as Class K, and that the highest policy that the company would write in any event on a person listed in Class K would be in the principal sum of \$500.00 and weekly indemnity not to exceed \$5.00.

The case was tried before the Honorable L. B. Schwellenbach without a jury on the 15th of June, 1945. The defendant company admitted that the policy in question was in full force and effect and stipulated that the plaintiff was totally incapacitated up to the time of the trial, but denied that the incapacity was permanent. No question was raised as to the validity of the policy. The court found in favor of the plaintiff for the full amount claimed on the basis of the decision in the case of *Nordin v. Commercial Casualty Insurance Co.*, 176 Wash. 59, holding that in view thereof that it was unnecessary to pass upon the question of alleged change of occupation.

Thereafter Findings of Fact and Conclusions of Law and a Judgment were signed by the court, calling for the payment of \$112.50 as hospital indemnity and for a further payment of \$25.00 per week from April 21, 1943, for the period of total disability to the plaintiff. Thereafter a motion for a new trial was made by the defendant and overruled by the court and notice of appeal was filed on the 25th of July,

1945, and all steps necessary to effect an appeal were taken.

3. Points to Be Relied Upon

In writing the brief and correlating the law on the various points which the appellant wishes to bring to the attention of the Circuit Court of Appeals, it has been found that some of the points set forth in the appellant's statement of points as contained in the Transcript of Record on page 81, necessarily merge and are discussed in each other. The appellant will therefore discuss the points to be relied upon under the following headings.

1. The jurisdictional amount of \$3000.00, exclusive of interest and costs was not involved.
2. Jurisdiction depends on facts alleged when suit is commenced and cannot be changed by later amendments.
3. The lower court was in error in calculating future speculative damages which had not yet accrued and using these speculative damages as a basis for holding that the required jurisdictional amount was involved.
4. The lower court was in error in basing its findings on the life expectancy of the plaintiff.
5. Remington's Revised Statutes of Washington, Section 7233, have been complied with by the defendant company and the district court was in error in deciding the case in favor of the plaintiff, on the ground that the defendant had failed to file proper classification of risks.

II.

ARGUMENT

1. There Was Not \$3000.00, Exclusive of Interest and Costs, in Controversy When Suit Was Commenced.

The Declaratory Judgment Act, under which this suit was instituted, does not create any new right. Under the Declaratory Judgment Act, the necessary jurisdictional amount of \$3000.00 is still required and it has been held with uniformity by the courts that before a declaratory judgment is issued there must be an actual controversy between the parties, which is a justiciable one, involving more than \$3000.00, exclusive of interest and costs.

The court in *Mutual Life Insurance Co. of New York v. Temple*, 56 F. Supp. 737, said as follows:

“The Federal Declaratory Judgment Act is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the Federal courts already have jurisdiction. * * *” (page 742)

As has been pointed out, the only controversy in the present case was the factual one of whether or not the plaintiff had changed his occupation so as to diminish the weekly payment called for under the policy. It might be noted again that not only was there not \$3000.00 involved at the commencement of the suit but at the time judgment was entered, several months after the commencement there was still less than \$3000.00 involved, exclusive of interest and costs.

One of the early leading cases which construed the monetary requirements for jurisdiction in the

Federal Court, which case has not been overruled, is *Elgin v. Marshall*, 106 U.S. 578, 1 S. Ct. 488, 27 L. ed. 249. That was a suit upon coupons of a value less than was required to confer jurisdiction, but its decision necessarily involved the validity of bonds from which the coupons had been detached, the value of which bonds was sufficient to give jurisdiction. It was dismissed for want of jurisdiction and the case has been followed by the Supreme Court in many leading subsequent cases.

Opelika City v. Daniel, 109 U.S. 108, 3 S. Ct. 70, 27 L. ed. 873;

Gibson v. Shufelt, 122 U.S. 27, 7 S. Ct. 1066, 30 L. ed. 1083;

Vicksburg, etc. R. R. Co. v. Smith, 135 U.S. 195, 10 S. Ct. 728, 34 L. ed. 95;

The Sydney, 139 U.S. 331, 11 S. Ct. 620, 35 L. ed. 177;

New England Mortgage Co. v. Gay, 145 U.S. 123, 12 S. Ct. 815, 36 L. ed. 646 (117, 118).

The court in the case of *Elgin v. Marshall* at page 580 says:

“* * * The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. *Lee v. Lee*, 8 Pet. 44; *Barry v. Mercein*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black, 271; *Sparrow v. Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of

parties, but must be given by the law, so it ought not to be extended by doubtful constructions.

“Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. *Williamson v. Kincaid*, 4 Dall. 20; *Course v. Stead*, id. 22; *United States v. Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record, as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case, unless its right and duty to do so are apparent upon the face of this record.

“The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the stat-

ute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. * * *”

Another important United States Supreme Court case reaching the same conclusion as the *Elgin* case was that of *New England Mortgage Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 36 L. ed. 646, wherein there was a suit for the amount due as interest on a mortgage. The sum in dispute was under the jurisdictional amount but there was interposed a defense of usury, which if sustained, under Georgia law, would invalidate the mortgagee's title and raise the question as to the validity of the whole loan, which loan was far in excess of the amount necessary to confer jurisdiction. The court held that the latter was a collateral matter which did not give jurisdiction to the court and that the actual amount involved in the suit was controlling.

The case of *Gibson v. Shufeld*, 122 U.S. 27, 7 S. Ct. 1066, 30 L. ed. 1083, reviewed all the early cases on this subject, holding that the court's jurisdiction was determined by the amount actually in controversy.

Perhaps the leading modern Circuit Court case involving the required jurisdictional amount, and one which is closely akin to the case here being considered by the court, is that of *Mutual Life Insurance Co. of New York v. Moyle* (C.C.A. 4) 116 F.2d 434. In the *Moyle* case, the insured had a policy which provided \$20,000.00 in death benefits and disability payments of \$200.00 per month. The insured made a claim for total and permanent disability and the claim was paid for a number of months. The policy also in-

volved a waiver of the premium during the period of disability. The Insurance Company thereafter refused to continue payment and alleged that the insured was no longer totally and permanently disabled within the meaning of the policy and insisted that the insured make payments to keep the policy in force. The insured contested these allegations. A declaratory judgment action was brought by the Insurance Company in the Federal Court to determine the rights of the parties and at the time the action was commenced there was due the insured under the disability provision of the policy less than the jurisdictional amount. It might be noted that the instant case and the *Moyle* case are virtually identical, the only difference being that in the *Moyle* case the question of fact was as to whether the disability continued to exit, giving the insured the right to collect the \$200.00 per month, while in the instant case the question of fact was as to whether there had been a change of occupation, which would cut the insured's right to collect \$25.00 per month down to a lesser sum. It is noteworthy that in the *Moyle* case the court clearly pointed out the fact that no controversy existed as to the validity of the policy nor as to its meaning. The court in its decision on page 435 makes the following statement:

“No controversy is alleged to exist as to the validity of the policies, but, on the contrary, plaintiff itself avers that they are valid obligations and are in full force and effect. Nor is there any controversy as to the meaning of the policies. They are attached to the complaint and plainly provide that, when it shall appear that the in-

sured is no longer totally disabled, no further disability payments will be made or premiums waived. The contention that the jurisdictional amount is involved is based upon the fact that the life expectancy of the insured exceeds the period of 16 months, for which the disability payments would exceed the sum of \$3,000, and that plaintiff under the laws of the State of New York is required to set up and carry, and does set up and carry, a reserve exceeding \$3,000 against insured's claim.

"We think it clear that all that is in controversy is the right of the insured to the disability payments which had accrued at the time of suit. The company is obligated to make these payments only so long as the condition evidencing total and permanent disability continues; and, as this condition, theoretically, at least, may change at any time, it is impossible to say that any controversy exists as to any disability payments except such as have accrued. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 56 S. Ct. 615, 80 L. ed. 971; *New York Life Ins. Co. v. Stoner*, 8 Cir., 92 F.2d 845; *United States Fidelity & Guaranty Co. v. McCarthy*, 8 Cir., 33 F.2d 7, 13, 70 A.L.R. 1447; *Metropolitan Life Ins. Co. v. Hobeika*, D.C., 23 F. Supp. 1; *Small v. New York Life Ins. Co.*, D.C., 18 F. Supp. 820. Such a case is to be distinguished from one where the controversy relates to the validity of the policy and not merely to liability for benefits accrued; for, in the latter case, the amount involved is necessarily the face of the policy in addition to the amount of such benefits. See *Stephenson v. Equitable Assur. Soc.*, 4 Cir., 92 F.2d 406; *Bell v. Philadelphia Life Ins. Co.*, 4 Cir., 78 F.2d 322; *Pacific Mutual Life Ins. Co. v. Parker*, 4 Cir., 71 F.2d 872.

"It is well settled that, in a suit by the insured to recover disability benefits under policies such as we have here the amount involved for purposes of jurisdiction is the amount of the disability benefits for which suit is brought. *Equitable Life Assur. Soc. v. Wilson*, 9 Cir., 81 F.2d 657. And this is true, although the probative effect of the judgment may be to establish the right of the insured to recover sums far in excess of the jurisdictional amount. Indeed the rule is applied with respect to suits to recover instalments of interest on bonds, where the recovery may be absolutely determinative of the right to recover in future cases. *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 816, 36 L. ed. 646. In the case last cited the court said: 'It is well settled in this court that, when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur * * *'."

The substance of the court holdings in the *Moyle* case was that where an action for declaratory relief is brought and the total amount of disability payments due to the insured when the complaint is filed is less than the jurisdictional amount and there is no controversy as the validity of the meaning of the policy, the action is properly dismissed, despite the fact that the insured had a life expectancy of a period for which the disability payments would exceed the required jurisdictional sum, since the jurisdictional amount cannot be predicated on speculation as to what may accrue to the insured in the future.

In *Wright v. Mutual Life Insurance Co. of N. Y.*, 19 F.2d 117, the court said:

“We are of the opinion that the trial court did not have jurisdiction of the subject matter and therefore erred in denying the appellant’s motion to remand the case to the State court. ‘The matter in controversy’ was the amount for which the appellant could recover judgment, that amount which could not exceed \$420.00, was much less than is required to confer jurisdiction on a Federal District Court. It is true that in the action the question was involved whether appellee was liable for double indemnity on past due installments and that a decision on that question would work an estoppel as to liability on future installments of an aggregate amount which would exceed the jurisdictional amount of \$3000.00.”

Cromwell v. County of Sac., 94 U.S. 351,
24 L. ed. 195.

“But the collateral effect of a judgment is not the test of jurisdiction, * * *.”

The court then went on to cite the case of *Elgin v. Marshall* and others we have mentioned above herein.

The *Wright* case was sustained by the Supreme Court of the United States in *Mutual Life Insurance Co. of New York v. Wright*, 276 U.S. 602, 48 S. Ct. 373, 72 L. ed. 726.

Another case which is pertinent to the set of facts under consideration here is *Button v. Mutual Life Insurance Co. of New York*, 48 F. Supp. 168. The court in that case on page 171 stated:

“The matter in controversy involves only the liability of the insurance company to make the

payments already accrued. No controversy exists in this action as to any disability payments under the contract in the future. The insurance company may or may not decline to pay them, and the facts occurring subsequent to the filing of this action may completely justify its refusal to make future monthly payments even though the result of this action obligates it to pay those already accrued; such subsequently occurring facts might lead the insurance company to make such payments in the future irrespective of the result of this action. This action is in no way res judicata as to its liability under the policy in the future. Although the effect of the judgment in this case may result in the insured collecting from the insurance company a total sum far in excess of the jurisdictional amount, yet it is well settled that when federal jurisdiction depends upon the amount in controversy, 'it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur.' *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 816, 36 L. ed. 646. The collateral effect of a judgment is not the test of jurisdiction. *Troy v. Evans*, *supra*, 97 U.S. 1, 24 L. ed. 941; *Town of Elgin v. Marshall*, *supra*, 106 U.S. 578, 1 S. Ct. 484, 27 L. ed. 249; *New Jersey Zinc Co. v. Trotter*, 108 U.S. 564, 2 S. Ct. 875, 27 L. ed. 828; *City of Opelika City v. Daniel*, 109 U.S. 108, 3 S. Ct. 70, 27 L. ed. 873; *Bruce v. Manchester & K.R.R.*, 117 U.S. 514, 6 S. Ct. 849, 29 L. ed. 990."

The Ninth Circuit Court of Appeals in the case of

Equitable Life Assurance Society of United States v. Wilson, 81 F.2d 657, held that in an action to recover \$750.00 as monthly disability payments already due under a \$2500.00 life insurance policy covering total permanent disability the jurisdictional amount could not be attained by adding the face of the policy to such payments, even though the insurance company's answer alleged the lapse of the policy for non-payment of premiums prior to the disability, and therefore the total value of the policy in issue. The court in its decision said as follows:

"The claim cannot prevail. The Supreme Court has decided that, in an action at law in which the controversy is for a sum less than the jurisdictional amount, the fact that the proof that the lesser sum was not then due involved the invalidity of a contract for a larger sum in excess of \$3000.00 but not then sued for does not create a controversy in excess of \$3000.00."

The court then went on to cite with approval many of the cases which have been quoted herein and distinguished cases cited by the trial court in its memorandum opinion denying the appellant's motion to dismiss.

The foregoing citations could be multiplied but sufficient cases have been set forth to indicate with clarity that the law is well settled to the effect that in an action to recover disability benefits under a policy such as is here in suit, the jurisdictional amount must be measured by the payment which have already accrued, regardless of the fact that the collateral effect of the judgment may establish a right in the in-

sured to recover sums which eventually will exceed the jurisdictional amount. The Federal courts will entertain a suit on such policies where the jurisdictional amount has not yet accrued only where the validity of the whole policy is in issue and the policy value exceeds the jurisdictional amount. Such is the import of the only cases which have been cited by the plaintiff in the lower court in defense of his bringing the action in a Federal rather than State court.

As has been pointed out above, the present case is one where the company, far from denying the validity of the policy, at all times has alleged it to be in full force and effect and has offered to make proper payments thereunder to the plaintiff. In the trial of the case, the company did not even contest the total disability of the plaintiff at the time the action was brought, but on the contrary stipulated that the point would not be raised. The only point which was litigated by the defendant was the factual one of whether or not the plaintiff had changed his occupation without notification to the company. By no stretch of the imagination could it be called a denial of the validity of the policy or even a fact which called for the construction of any of the terms of the policy.

The plaintiff has not alleged or contended that the clause in the policy in reference to change of occupation and calling for notification in case of such change was invalid and the plaintiff has, on the contrary, steadfastly maintained that he did not change his occupation contrary to the policy provisions. It follows therefore that this was the only controverted fact in the case.

It has already been decided by several of the Circuit courts, in cases cited above, that the denial by the company that the policy holder had suffered disability entitling him to collect did not raise a question as to the validity of the policy, entitling the party to bring suit in the Federal Court, if the overdue payments did not exceed jurisdictional amount. It would seem to follow equally clearly that merely raising the question as to whether or not a policy holder had changed his occupation prior to receiving the injury for which redress is sought would also in no way be deemed to be an attack upon the validity of the policy. The judge of the lower court in overruling the defendant's motion to dismiss and sustaining the right of the plaintiff to bring this action in the Federal Court rested his decision on the case of *American General Insurance Co. v. Boose*, 146 F.2d 329.

It is respectfully submitted that the cited case is not in point. This case was one where there was an automobile accident and the insurer of the defendant brought an action in the Federal Court to have a declaration of its non-liability under the policy made, in a suit which had been brought by the appellant against the appellees. One of the persons injured in the automobile accident subsequently died and suit was brought for \$25,000.00. The contention of the litigant who brought the declaratory judgment action was that, inasmuch as there was no certainty that more than \$3000.00 would be obtained, that the case should therefore be dismissed. Obviously this contention was ill founded in that there is no certainty in any case that the plaintiff will recover anything and if such

were the test no case could ever be brought in a Federal court.

It is respectfully submitted, however, that the *Boose* case sets forth an entirely different set of facts than the instant one where it appears from the face of the complaint that if the plaintiff recovered everything for which he prays he could not possibly obtain a judgment for the jurisdictional amount, exclusive of interest and costs.

2. Jurisdiction Depends on Facts Alleged When Suit is Commenced and Cannot Be Changed By Later Amendments.

Regardless of what the rule may be in other situations, it has been uniformly held that federal jurisdiction, as regards the amount involved, is determined by the facts before the court when the suit is commenced and any deficiencies cannot be cured by later amendments. We respectfully refer the court to the following language from the case of *Ford, Bacon & Davis, Inc. v. Volentine*, 64 F.2d 800:

“Federal jurisdiction depends on the facts at the time suit is commenced, and subsequent changes neither confer nor divest it. This is well settled as to diversity of citizenship.”

Other cases reaching the same result are:

Mutual Life Insurance Co. v. Rose, 294 Fed. 122;

Cohn v. Cities Service Co., 45 F.2d 687.

Another Federal case held that the right to inter-

vene presupposes action duly brought, and if jurisdiction is lacking at the commencement of the suit, because the amount involved is insufficient, it cannot be aided by intervention of a creditor with a sufficient claim. *Pianta v. H. M. Reich Co.*, 77 F.2d 888.

It has further been determined that the amount of value of the right in dispute cannot be augmented for jurisdictional purposes by the collateral effect a judgment in the case will produce. *Elliott v. Empire Natural Gas Co.*, 4 F.2d 493, *Scarborough v. Mountain States Telephone Co.*, 45 F. Supp. 176.

The Circuit Court of Appeals for the second circuit in deciding the case which came before them in 1930, gave a succinct statement of the general rule that the question of jurisdiction must be determined from the original complaint, in using the following language:

“Cohn’s bill would not give jurisdiction to the district court, and certainly alone would have been dismissed, because the subject matter in dispute was not of the value of \$3000.00. It is true that it contained general allegations to the contrary, but, when a bill carries its own contradiction on its face, that is not conclusive.”
(Citing cases)

Cohn v. Cities Service Co., 45 F.2d 687.

Even if the objection that the amount in controversy was insufficient to sustain the jurisdiction of the Federal Court, was not raised, it is the duty of the court to dismiss of its own motion, if the cause was not within its jurisdiction. *Lion Bonding Co. v. Koratz*, 280 Fed. 532.

3. The Lower Court Was in Error in Calculating Future Speculative Damages Which Had Not Yet Accrued and Using These Speculative Damages As a Basis for Holding That the Required Jurisdictional Amount Was Involved.

Many of the citations contained in Section I of the appellant's argument also are authority for the contention of the appellant as set forth under this heading. There were in addition many other Federal cases which specifically emphasized that in a suit to recover periodic payments due to the plaintiff under the terms of an accident insurance policy that only those payments may be recovered which are due at the commencement of the action and that, inasmuch as the situation may change at any time by the death or recovery of the plaintiff that the court will not speculate as to the amount or value of payments which have not yet accrued.

Reuter v. Pacific Mutual Life Insurance Co.,
43 P.2d 576;

Cobb v. Pacific Mutual Life Insurance Co.,
40 P.2d 574;

Parks v. Maryland Casualty Co., 59 F.2d
736.

In the case of *Mobley v. New York Life Insurance Co.*, 74 F.2d 588, the court in holding that suit could not be maintained for unmatured payments due under an accident or life insurance policy went so far as to use the following language:

"Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its ob-

ligations. Such an error made in good faith whether founded in mistake of law or fact is not repudiation, and does not end a continuing contract, but calls only for enforcement according to its terms. * * *”

In this particular connection the appellant takes the liberty of repeating again the following language from *Mutual Life Insurance Co. of New York v. Moyle*, 116 F.2d 434:

“We think it clear that all that is in controversy is the right of the insured to the disability payments which had accrued at the time of suit. The company is obligated to make these payments only so long as the condition evidencing total and permanent disability continues; and, as this condition, theoretically at least, may change at any time, it is impossible to say that any controversy exists as to any disability payments except such as have accrued. * * *”

4. The Lower Court Was in Error in Basing Its Findings On the Life Expectancy of the Plaintiff.

The defendant submits that it is so fundamental as not to require citation that the life expectancy of the plaintiff could not be used as a basis for computing the damages or in holding that the court had jurisdiction, when no evidence of the said life expectancy was produced or offered at the trial of the case.

Even had there been competent evidence produced as to life expectancy of the plaintiff, it is respectfully submitted that the courts have frequently reaffirmed the fact that in suits on accident policies, such as is being considered in the instant case, that the life expectancy of the plaintiff cannot be used as a basis

for calculating damages which have not yet and may never accrue. In the case of *Travelers Insurance Co. v. Wechsler*, 34 F. Supp. 721, the court set forth the following on page 723:

“In the absence of a showing or effort to cancel the policies as in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. ed. 617, 108 A.L.R. 1000, or in the absence of allegations of lapse of policies by the failure to pay premiums or in the absence of admission of total and permanent disability, but in denial thereof, it is difficult to see how the life expectancy of the assured, multiplied by the yearly disability benefits contained in the policy, or the reserve to be maintained under the policies, could either be computed to supply the requisite amount in controversy.”

In the case of *Mitchell v. Mutual Life Insurance Co. of N. Y.*, 31 F. Supp. 441, the following language is used, relative to the ability of the plaintiff to plead future potential payments, not yet accrued in order to establish the jurisdictional amount, necessary for the entertaining of the suit by the Federal Court.

“If the plaintiff be determined by trial to be totally and permanently disabled, he will be entitled to money judgment for six months at \$30.00 per month or the sum of \$180.00. We are computing to the date of filing of suit, December 7, 1939, which is the date on which jurisdiction is to be ascertained. Payments in the future during total and permanent disability are not to be considered in establishing jurisdiction. *Wright v. Mutual Life Insurance Co.*, 5 Cir., 19 F.2d 117; *Mutual Life Insurance Co. of N. Y. v. Wright*, 276 U.S. 602, 48 S. Ct. 323, 72 L. ed.

726; *Elgin v. Marshall*, 106 U.S. 578, 1 S. Ct. 484, 27 L. ed. 249; *Small v. N. Y. Life Insurance Co.*, 18 F. Supp. 820.”

Other cases reaching the same result and denying the right to add future payments, not yet accrued, in order to establish a jurisdictional amount are:

Parks v. Maryland, 59 F.2d 736;

Mobley v. N. Y. Life Insurance Co., 74 F.2d 588.

The case of *Mutual Life Insurance Co. of N. Y. v. Moyle* cited above further holds that the life expectancy of the plaintiff is not an element which can be used as a basis for computing future speculative installments on an accident policy such as is here in question and using this speculative amount to confer jurisdiction on a Federal Court.

5. The Requirements of Remington's Revised Statutes of Washington, Section 7233, Have Been Complied With by the Defendant Company and the District Court Was in Error in Deciding the Case in Favor of the Plaintiff, on the Ground That the Defendant Had Failed to File Proper Classification of Risks.

The lower court did not pass upon the substantial issue presented in the case, namely, as to whether or not the plaintiff had changed his occupation, but decided the case in favor of the plaintiff on the ground that the defendant had not complied with Section 7233 of Remington's Revised Statutes of Washington. This section deals with the requirement that insurance companies writing health and accident policies file with the Commissioner of Insurance a form of each

policy that they issue and a schedule of rates and the classification of risks affecting said policies.

Most states have a statute similar to the one referred to and its obvious purpose is two-fold. Primarily, it is for the purpose of calling to the attention of the Insurance Commissioner any new policy issued in the State so that the Commissioner will have the opportunity to pass upon it and, secondly, it is for the purpose of having information on file with the Commissioner, whereby any interested person may ascertain what his rights are under any policy which is issued in the State. It is not the purpose of the statute to encumber the records of the Insurance Commissioner's office with a duplicate of identical material on each and every occasion that an insurance company makes a trivial change in an existing policy or issues a new policy containing slightly altered provisions.

The evidence indicates that the defendant company wrote several accident policies, the principal difference being that one type of policy, such as the one here in suit, was issued only to preferred risks or to people who were engaged in less hazardous occupations. The other policy would be written with substantially the same provisions but with reduced indemnities, for people whose occupations were considered to be more hazardous. The premium rates and the policy provisions would differ, but the classification of risks was the same in each case, in that the classification of risks was merely a list of different occupations, to each of which was appended a symbol or letter so that the degree of hazard attached to any

occupation could be quickly ascertained by referring to the classification manual. Not only did the defendant company have but one classification of risks but virtually all of the companies writing this type of insurance classified the risks in the same manner.

The policy in suit was issued to the plaintiff on the 4th day of May, 1937. As is indicated by the testimony of Lee I. Kuelchelahn, found on page 101 of the Transcript of Record, the original classification of risks filed by the defendant company was received in the insurance commissioner's office on May 29, 1929. The Star Accident Insurance Policy was filed on June 3, 1931, and thereafter the defendant company filed a later manual on October 1, 1932. The later manual, which is referred to in the evidence as the red manual, is defendant's exhibit I. Due to its bulk, it was not printed in the Transcript of Record but was attached thereto. It should be noted that the classifications of mail carrier and army officer are not changed in the red manual.

The so-called red manual filed in 1932 superseded the prior manual and referred to all of the policies which the company then issued in the State of Washington.

The court in rendering its oral decision, a part of which is contained on the bottom of page 123 of the Transcript of Record, quoted Remington's Revised Statutes of Washington, Section 7233, as follows:

"Rem. Rev. Stat., Sec. 7233, provides that no accident insurance policy shall be issued or delivered until a copy of the form thereof and of the classification of risks pertaining thereto

have been filed with the Insurance Commissioner."

The court in quoting this section left out the following language contained in the statute.

"If more than one class of risks is written."

The evidence clearly indicates that the defendant company writes only one class of risks which classification is set forth in the red manual.

In the case of *Nordin v. Commercial Casualty Ins. Co.*, 176 Wash. 59, it appears that the classification of risks which had been filed referred directly to one policy form 2H, which policy was not in evidence in the case, and, due to its absence the court was not in a position to ascertain whether there was such a similarity between the policy to which the classification of risks applied and the one in suit so as to be able to determine whether the classification should be interpreted to extend to the later. In the *Nordin* case, the court merely holds that inasmuch as the classification of risks applied to a specific policy, they could not assume that that policy and one in suit were the same. In the case now before the court the classification of risks filed in 1932 and referred to as the red manual, was the only classification filed by the company and applied to all of its underwriting. In addition thereto the company filed a specimen Star Accident Policy and also filed the premium rates of the Star Accident Policy, which rates, as filed with the Commissioner of Insurance, were introduced as evidence in this case and are set forth under Defendant's Exhibit No. II on page 129 of the Transcript of Record.

If the court's contention is to be upheld, the defendant would be obliged to do the repititious act of filing the same manual a number of times and having imprinted thereon that each manual applied to different policies, despite the fact that the manual of risks in each case would be identical. The contention is, that the company is in error and must forfeit its rights because it filed only one copy of its manual whereas if it writes twenty different policies containing immaterial variations, it would have preserved its right by filing twenty copies of the same classifications of risks.

It might be held that the requirements of the *Nordin* case cited above or of Remington's Revised Statutes of Washington, Section 7233, have not been complied with if the company had on file several different classifications of risks and several different policies, the classification of risks not specifically applying to any particular policy. In such case there would be a reasonable confusion in determining what classification of risks applied to what policy. In the instant case, however, where there is only one classification of risks, there can be no doubt or confusion but that it applies to each policy filed by the company.

The policy issued by the defendant under its change of occupation clause set forth on page 32 of the Transcript of Record contains the following language.

"If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having super-

vision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the company's rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the company is liable."

It should be further noted that the filing of the classification of risks and premium rates and policy had been made by the defendant company to the satisfaction of the insurance commissioner of the state.

CONCLUSION

Having in mind the fact that the Declaratory Judgment Act does not in any way enlarge or change the monetary jurisdictional requirements of the Federal Courts and it appearing as an undisputed fact from both the pleadings and evidence that the only elements which were contested in this case were those of change of occupation and duration of injury, it is submitted that this case falls under the repeatedly enunciated rule that all that can be recovered in suits of this character where the policy is not in issue, is the amount due at the time suit is commenced. The appellant alleges that it is an incontrovertible fact that the jurisdictional amount was not involved and that the suit should have been and should be dismissed upon that ground and that the life expectancy of the plaintiff or any similar factor cannot cure this fundamental jurisdictional defect.

It is further submitted that the court was in error in refusing to pass upon the fact of change of plaintiff's occupation and in deciding the case on the basis of alleged violation of Section 7233 of Remington's Revised Statutes of Washington.

In view thereof the appellant respectfully submits that the judgment of the trial court should be reversed and that the action should be dismissed.

Respectfully submitted,

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No. 11139

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COMMERCIAL CASUALTY INSURANCE COMPANY,
a New Jersey corporation,

Defendant-Appellant,

VS.

LESLIE O. FOWLES,

Plaintiff-Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

JUNE FOWLES,

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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
Defendant-Appellant,

VS.

LESLIE O. FOWLES,

Plaintiff-Appellee.

No.
11139

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT

The Appellee, Leslie O. Fowles, insured herein, instituted this action against the appellant, Commercial Casualty Insurance Company of New Jersey, insurer herein, in the District Court under the Federal Declaratory Judgment Act (Sec. 274, 28 U. S. C. A. Sec. 400) alleging diversity of citizenship, a justiciable con-

troversy as to the meaning and construction of the policy in question, total and permanent disability and that the value of the rights he was seeking to preserve and protect exceeded the jurisdictional amount.

Insured in this action was injured in an automobile accident April 14, 1943, and has been continuously and totally disabled from that date. Due notice and proof of injury were given to the insurer but no offer of payment, either in the amount demanded by insured or the pro-rated amount alleged to be due by insurer, has been made.

The insurance policy involved herein was issued to the insured at Olympia, Washington, by the insurer, the Commercial Casualty Insurance Company, on or about May 5, 1937, upon insured's application therefor and in consideration of the payment of the semi-annual premium of \$10.20. The policy was a life and accident policy designated as Star Accident Policy No. 14H 5110. That said policy of insurance by virtue of renewals thereof, remained in full force and effect herein.

That said policy provided, among other things, for the principal sum of \$1000 payable upon accidental death; \$25 per week disability benefit for loss of time resulting from accidental bodily injury from the date of any accident causing continuous total disability

which would prevent insured from performing each and every duty pertaining to his occupation; \$100 identification disability; and the further additional benefit of \$25 per week for fifteen consecutive weeks if such injury, within ninety days, necessitated treatment and residence in a hospital.

That at the time insured made application for said policy of insurance, his occupation was that of mail carrier in the postal service of the United States in the city of Olympia, Washington; that at said time, insured was, and had been for a number of years, a member of the Washington National Guard; that the Washington National Guard was mobilized in 1941, and later made a part of the Army of the United States, which facts were known to insurer's agent, Bader (Tr. 93).

Insured was on leave or furlough at the time of his injury and engaged in recreation. Insured duly notified insurer of said accident and submitted proof that he was totally disabled. The insurer failed to pay the benefits due under said policy of insurance and eighteen months later, October 11, 1944, insured began this action. The insurer moved to quash summons and service of the complaint and demurred thereto on the ground that the jurisdictional amount was not involved. On the 16th day of January, 1945, the insured

filed an amended complaint, and the insurer again moved to quash and demurred. A hearing was had and the trial court treated the motion to quash as a motion to dismiss, and the demurrer was overruled and the motion to dismiss denied on April 11, 1945.

On April 26, 1945, insurer filed its answer alleging the Federal court had no jurisdiction because the amount in controversy did not exceed \$3,000, that there was no justiciable controversy, and that the insured had changed his occupation to one more hazardous, that of officer in the United States Army, which was classified by insurer for rating purposes as "Class K." In paragraph III of the affirmative defense in said answer, insurer sets forth that "Class K" provides a principal sum of \$500, and a weekly indemnity not to exceed \$5.00 and that in pro-rating any claim the limits referred to would be strictly adhered to. Insurer maintains in paragraph V that because of such purported change in occupation, that it is obliged to pay to the insured a sum not in excess of \$5.00 per week for the period during which insured was confined in a civilian hospital.

Insurer in its answer alleged further that on or about September 15, 1932, it filed its manual containing the classification of risks of various occupations for insurance purposes, with the Insurance Commissioner

of the State of Washington, and alleged that at all times thereafter it was on file with said insurance commissioner, which insured denied.

The case was tried without a jury in the district court on June 15, 1945, before the Honorable L. B. Schwellenbach.

The Court found in favor of the insured upon the basis of the case of *Nordin vs. Commercial Casualty Company*, 176 Wash. 59, 28 P. (2d) 259, upon the ground that insurer had failed to establish the fact that it had filed with the Insurance Commissioner of the State of Washington, a copy of its classification of risks pertaining to the policy in suit, the Star Accident Policy No. 14H 5110, Cas. A. & H. 5643 as required by the laws of the State of Washington, Rem. Rev. Stat. Sec. 7233. The court held that, in view of such decision, it was not necessary to pass upon the question of alleged change of occupation or estoppel.

Thereafter, and on June 22, 1945, Findings of Fact, Conclusions of Law and Judgment were entered calling for payment of \$25.00 per week with interest from date of accident until date of trial, and the further sum of \$112.50 as hospital indemnity.

A motion for new trial was made by the insurer and overruled by the court. Notice of appeal was filed on the 25th day of July, 1945.

ARGUMENT

- I. Judicial Discretion—Liberal Construction.
- II. Controversy.
- III. Jurisdiction.
 - a. Value of rights to be preserved and protected.
 - b. Validity, attempt to vitiate policy.
 - c. Life expectancy-future right.
 - d. Cases cited by insurer relating to jurisdiction.
 - e. Federal jurisdiction depends on facts at the time suit is commenced.
- IV. Question of pro-rating.

ARGUMENT

I. JUDICIAL DISCRETION AND LIBERAL CONSTRUCTION

It has been repeatedly held: That a declaratory judgment proceeding is neither wholly a suit in equity nor an action at law, but *sui generis*, and should be liberally construed. It may veer toward equity or toward law, but the underlying principle of the declaratory judgment is equity, and the granting of it should rest in the sound discretion of the court, as the remedy of declaratory relief, while created by statute, is one based largely on equitable consideration. (Construc-

tion and interpretation of written instruments are the principal functions of a declaratory judgment and was intended to allow declaration of rights whether or not other relief was asked. It contemplated not a mere determination of questions which may have arisen between the parties but an affirmative declaration of plaintiff's rights.) That the granting of declaratory relief under this section should rest in the court's discretion is implied from the fact that the act merely gives the court power to grant the remedy without prescribing conditions under which it is to be granted.

“While the Federal act does not expressly provide that the granting of declaratory relief shall rest in the Court's discretion, this is clearly implied * * * *” *Aetna Casualty & S. Co. vs. Quarles*, 92 F. (2d) 321, 324.

142 A. L. R. 19.

“The exercise of discretion to assume or refuse jurisdiction to make a declaration is said to depend upon whether the declaration will serve the purpose of the statute to clarify and settle the legal relations in issue.”

In *Lumbermen's Mut. Casualty Co. vs. McIver*, 27 F. Supp. 702, 706, the court held:

“It is well established law that the granting of a declaratory judgment lies considerably within the discretion of the court, after mature consideration of all the circumstances of the case.”

It was said in *Mutual Life Ins. Co. of New York vs. Krejci*, 123 F. (2d) 594, that the jurisdiction granted by Congress under the declaratory judgment act is not to be exercised or denied at any whim of the trial court.

142 A. L. R. 58 states that a declaratory judgment involving the determination of questions of fact does not preclude its application, since the courts have the power to determine questions of fact when necessary or incidental to the declarations of legal relations.

Courts have the power, in actions for declaratory judgments, to determine questions of fact when that is necessary or incidental to the declaration of legal relations.

II. CONTROVERSY

Under the provision of the Federal Declaratory Judgment act, the Courts of the United States shall have power to declare "rights and other legal relations of any interested party petitioning." *Maryland Cas. Co. vs. United Corp. of Mass.*, 29 F. Supp. 986.

In the present action, the justiciable controversy relates to the *meaning* of the policy and also as to the *validity* of the policy, but insurer denies that a controversy exists as to the meaning and validity of the policy. (Paragraph XI of insurer's Answer.)

The portions of the policy in which the meaning is in controversy and a summary of the controversy are as follows:

1.

PRINCIPAL SUM. It is the position of the insured that the death clause in an accident policy is life insurance within the meaning of the state statute providing that life insurance shall be incontestable after a certain period, but the insurer is attempting to reduce the face value of the policy.

2.

HOSPITAL INDEMNITY. The trial court construed the meaning of Schedule VIII. The insured alleged he was entitled to be paid for the full fifteen weeks he was confined in a hospital while the insurer contended insured was entitled to only the time in a civilian hospital, four and one-half weeks. Schedule VIII, providing hospital expenses provides:

“If such injury to the Insured shall entitle him to weekly indemnity for total disability under the terms of this policy and within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to the indemnity otherwise provided for a period not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount for hospital expense but not exceeding

per week the amount payable hereunder as single weekly indemnity.”

The language providing for Graduate Nurses fee is as follows:

“(Schedule IX) If such injury to the Insured shall entitle him to weekly indemnity for total disability under the terms of this policy and within ninety days from the date of commencement of said disability, the Insured shall need and receive the care and attendance of a nurse who is a graduate of a licensed hospital, and provided no claim is made for hospital expenses, the Company will pay to the Insured the amount actually and necessarily expended by him to secure such nurse’s care and attendance, for a period not exceeding fifteen consecutive weeks but not exceeding per week the amount payable hereunder as single weekly indemnity.”

It will be noted that in the latter provision it is stated “the amount actually and necessarily expended by him.” This was not the wording of the hospital expense provision. If the company had intended to limit the hospitalization indemnity to the actual amount expended, it could have so provided.

3.

CHANGE OF OCCUPATION. In view of the numerous actions involving this one clause, there can be no doubt that it is generally controversial. It reads:

“This policy includes the endorsements and attached papers, if any, and contains the entire con-

tract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

“If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having supervision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the Company is liable.”

The insurer alleges insured changed his occupation when he was mobilized with the National Guard, the National Guard later being made a part of the Army of the United States. The insured contends that within the meaning of said clause, he did not change his occupation. The facts are as follows:

At the time of the application for the insurance policy he was a member of the Washington National Guard, and he continued to maintain his membership in the Washington National Guard until February 3, 1941, when the Washington National Guard was mobilized, at which time he was granted a leave of absence from the post office. At the time of the accident, he was carried on the records of the post office as an employee on leave, and no one was hired permanently in his place. His seniority rights were protected, and his name continued on the retirement annuity records, and the payments he had made toward the retirement annuity were retained by the post office. He had paid into the annuity fund for almost nineteen years for retirement, and he had no intention of forfeiting such future security. His intention was to return to his work in the post office as soon as he was discharged from the army, and he would now be back in his employment if he were physically able to carry on work of any kind. His rights to return to his employment and to continue his occupation have of course been protected by veterans' legislation, which guarantees to him the right to return to his employment. It was the position of insured that a change of occupation requires a voluntary and intentional act whereby one occupation is abandoned and a new occupation chosen and followed. Insured was mobilized in the

Army of the United States as distinguished from the United States Army, the latter being the regular army, while the former is temporary and for the duration of the war.

If the insurer were correct in its assumption that the insured changed his occupation, it would be necessary to construe the meaning of the exception phrase of said cause reading: "or while he is doing any act or thing pertaining to any occupation so classified, *except ordinary duties about his residence or while engaged in recreation.*" (Italics added.) There is a controversy regarding the meaning of this phrase. As construed by the insured, it would except him from the change of occupation clause (if he had changed his occupation as insurer contended) since he was on leave or furlough at the time of the accident and "that his activities at the time of said injury had no causal connection with his occupation or any occupation; and that at said time he was engaged solely in recreation and was operating a personally owned motor vehicle for his own enjoyment, an act common to the lives of men without regard to occupation." (Tr. 15.)

4.

TOTAL AND PERMANENT DISABILITY. There was a controversy regarding insured's total and permanent disability, but at the trial counsel for insured and for

insurer stipulated that insured was totally disabled from the date of accident to the date of trial without limitation or restriction as to future total disability (Tr. 60).

Section 274d of the Judicial Code, 28 U. S. C. A. Sec. 400, provides, in part:

“(1) In cases of actual controversy * * * the courts of the United States shall have power upon petition * * * to declare rights and other legal relations of any interested party petitioning for such declaration * * * and such declaration shall have the force and effect of a final judgment or decree.”

In *Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 57 S. Ct 461, 81 L. Ed. 617, the Supreme Court of the United States defined what is meant by “cases of actual controversy” under the Act, at page 240 of 300 U. S.:

“A ‘controversy’ in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”

Borchard, in his book "*Declaratory Judgments*" (2d Ed.), says at page 56:

"The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events—although it may involve future benefits or disadvantages—and the prejudice to his position must be actual and genuine and not merely possible or remote."

In *Aetna Life Ins. Co. vs. Williams*, 88 F. (2d) 929, it was held that *justiciable controversy* arises as to the amount due the beneficiary of an insurance policy, where the amount payable by the terms of the policy was to be reduced if the insured engaged in a more hazardous occupation, the insurer claiming that the insured at the time of his death, was engaged in a more hazardous occupation, and the beneficiary claiming the full amount of the policy.

A concrete dispute relating to the rights of the insured under the contract of insurance existed and the District Court had the judicial discretion to take jurisdiction of insured's action for a declaratory judgment adjudicating the parties' rights and obligations.

III. JURISDICTION.

The Federal Declaratory Judgment Act does not itself contain any provision with reference to jurisdictional amounts. Where it appears evident that a just

determination may be attained, the court will not be lax in exercising its discretion in assuming jurisdiction.

The requisites of jurisdiction are: diversity of citizenship; justiciable controversy and the jurisdictional amount. Under the heading of justiciable controversy would be the construction of the meaning of the policy. Under the heading of jurisdictional amount would be considered the value of insured's rights, validity of the policy, face value, benefits and life expectancy.

a. Value of Rights to be Preserved and Protected.

The value of the right in dispute determines the jurisdiction of the Federal court, and it has been said that the exercise of jurisdiction under the declaratory judgment act under such circumstances, is not to extend the jurisdiction of the court but merely to hasten the day when jurisdiction may be invoked. The trial court in its memorandum opinion cites many cases which will not be repeated under this section.

b. Validity—Attempt to Vitate Policy.

Where validity of the policy is being attacked, the face value of the policy may be added to the accrued benefits.

In *Stephenson vs. Equitable Life Assur. Soc.*, 92 F. (2d) 406, Judge Parker said at Page 410:

"The fact, that in addition to asking judgment declaring the rights of the parties in the premises, plaintiff asked a recovery of the past-due disability installments, does not detract from the power of the court to grant the declaratory relief. Upon the court's declaring the rights of the insured under the policy in accordance with his contentions, he would have been entitled to recover these installments; and the second paragraph of the act expressly provides for the granting of further relief whenever necessary or proper.

"And we think there can be no question but that the requisite jurisdictional amount was involved in the suit. This amount was not merely the unpaid disability installments, as the judge below erroneously thought, but also the \$5,000 double indemnity feature of the policy which the company had declared void, and the \$5,000 ordinary life feature, which the company had declared lapsed and for which it has substituted extended term insurance in that amount. *Bell v. Philadelphia Life Insurance Co.*, *supra*; *Pacific Mutual Life Ins. Co. v. Parker* (CCA 4th) 71 F. (2d) 872, 874. The suit, therefore, involved the validity of a contract for \$5,000 of accident insurance and the status of a contract for \$5,000 of ordinary life insurance, in addition to the validity of the policy of disability insurance upon which the insured was claiming the past due installments of disability benefits. The case is clearly distinguishable from *Equitable Life Assurance Society v. Wilson* (C. C. A. 9th) 81 F. (2d) 657 which involved merely the unpaid installments of disability benefits amounting to only \$750." (Italics added.)

Jensen vs. New York Life Ins. Co., 50 F. (2d) 512:

“In the case at bar, the policy contained a two-year incontestable clause, and the minimum face liability of the policy was shown to be \$7,500.

“In the case of *Mutual Life Ins. Co. v. Thompson* (DC) 7 F. (2d) 753, 754, Judge McDowell, with forceful reasoning, reached the conclusion that in a suit to cancel an insurance policy, if the bill alleged that the ‘value of the object sought by the bill’, exclusive of interest and costs, exceeded the sum of \$3,000, this was sufficient to confer jurisdiction.

* * *

“In *Elliott v. Empire Nat. Gas. Co.*, 4 F. (2d) 493, 497, an injunction case, this court, after reviewing many authorities, held that the ‘value of the matter in controversy’ in Judicial Code Sec. 24 (28 U. S. C. A. Sec. 41), means the pecuniary result to either party which the judgment entered in the case would directly produce, either at once or in the future.

“Whether we apply, therefore, the test as laid down in the Fifth circuit, or the test suggested in the Fourth circuit by Judge McDowell, or the test suggested for analogous cases by this court in the Elliott Case, *supra*, and apparently followed by the trial court in the case at bar, the same result is reached that the requisite jurisdictional amount is involved, and that jurisdiction of the federal court existed.”

Pacific Mut. Life Ins. Co. vs. Parker, 71 F. (2d) 872, 874. (Opinion by Judge Parker)

“We agree with appellant that the case involves the amount requisite to federal jurisdic-

tion. What is asked by the bill is not merely that prosecution of the suits which have been instituted be restrained, but also that the policies be canceled and surrendered. As one of the policies provides for the payment of \$5,000 in case of accidental death, and as the monthly payments for disability amount to \$500 per month, which under the terms of the policies is to continue throughout the life of the insured, there would seem to be no question as to more than \$3,000 being involved
* * * .”

Insurer in the present case is attempting to cancel a provision of the policy which had become incontestable under our state law.

At page 874 of the Parker case, *Supra*, it was said that an insurance policy, providing for payment in case of accidental death, is “life insurance policy” to such extent within state statute, prescribing incontestable period for such policies.

Whitfield vs. Aetna Life Ins. Co., 205 U. S. 489, 498, 27 S. C. 578, 51 L. Ed. 895;

Continental Casualty Co. vs. Agee (C. C. A. 8th) 3 F. (2d) 978;

Aetna Life Ins. Co. vs. Wertheimer (C. C. A. 10th) 64 F. (2d) 438.

Our Washington statute, Sec. 7230 Rem. Rev. Stat., provides:

“No life insurance policy, * * * shall be issued or delivered in this state on and after January

First, Nineteen Hundred and Twelve, unless it contains in substance the following provisions:

* * * * *

“(2) A provision that (the) policy, so far as it relates to life or endowment insurance shall be incontestable after two years from the date of issue except for non-payment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war.”

The face value of principal sum of said policy is \$1000 payable in event of accidental death. In Schedule I, of said Star Accident Policy, it is provided:

“(a) If such injury shall continuously and wholly disable the Insured any time within two weeks from date of accident from performing any and every duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under SPECIFIC LOSSES, the Company will pay the sum set opposite such loss:

* * * *

“In ADDITION THE WEEKLY ACCIDENT INDEMNITY as provided in Schedule II between the date of accident and date of such loss; provided further, that not more than one of the amounts (the greater) named under SPECIFIC LOSSES shall be payable for injuries resulting from one accident.

“SPECIFIC LOSSES

“Loss of LifeThe Principal Sum”

Insurer is attempting to vitiate the policy of insurance by attacking the amount of the face value of the

policy which is incontestable and by asserting the benefits should be pro-rated to one-fifth of the amounts set forth in the written contract of insurance. Even if insured had changed his occupation as contended by insurer, the benefits of the policy could not be reduced inasmuch as insurer has not complied with the state law, and insurer's attempt to reduce benefits is an attempt to cancel.

c. Life Expectancy—Future Rights.

The trial court, in considering the value of future benefits was justified also in taking into consideration insured's life expectancy and was supported by numerous authorities. The trial court did not consider insured's life expectancy for the purpose of computation or compilation of future damages for the amount of a judgment; the trial court did not award future damages in its judgment. Total and permanent disability was alleged by the insured, who was 38 years old at the time of his injury, and consideration of life expectancy would be material in an action to protect and preserve the value of the rights of insured.

Among the many cases holding that life expectancy may be considered are the following:

In *Ballard et al. vs. Mutual Life Ins. Co. of New York*, 109 F. 2d 388, 389, the court said:

“The declaratory action originally instituted by appellee (now pending in the court below) sought to relieve the plaintiff from the claim of the insured that he was entitled to receive disability payments and to have the policies maintained in force under the disability provisions thereof without payment of premiums thereon. This claim (from the asserted liability for which the plaintiff asked to be relieved) was alleged to be in excess of \$3,000, and since the insured is only forty-two years of age, has a reasonable life expectancy of many years, and is alleged to be totally and permanently disabled, it appears to us that the value of his claim is not overstated. The amount in controversy is the value of the claim which the company is seeking to have cancelled in the court below, not the amounts sued for in the state courts.”

Mutual Ben. Health & Accident Ass'n vs. Fortenberry, 98 F. (2d) 570, held that the obligations which the insurer might be compelled to pay in the future were not merely contingent and would enter into the amount in dispute, regarding federal court's jurisdiction on ground of diversity of citizenship, of suit to cancel life, accident, and health policy. In determining obligations the insurer might be compelled to pay in the future, which would enter into amount in dispute, the life expectancy of the insured could be considered.

Thompson vs. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347.

Brotherhood of Locomotive Firemen and Engineers vs. Pinkston, 293 U. S. 96, 55 S. Ct. 1, 79 L. Ed. 219;

New York Life Ins. Co. vs. Swift, 5 Cir., 38 F. 2d 175;

Jensen vs. New York Life Ins. Co., 8 Cir., 50 F. 2d 512.

In the authorities cited by insurer, future damages were asked to be made a part of the judgment. The circumstances differed from the present case.

Insurer cited the case of *Travelers Ins. Co. vs. Wechler*, 34 F. Supp. 721, in its brief. In the Wechler case there is considerable discussion of the difference between it and *Aetna Life Ins. Co. vs. Haworth*, 300 U. S. 227, *Ballard vs. Mut. Life Ins. Co.*, and *Mut. Health & Acc. Ass'n vs. Fortenberry*, *supra*. The court said:

“In the absence of a showing, or effort, to cancel the policies * * * or in the absence of allegations of lapse of the policies by failure to pay premiums, or *in the absence of an admission of total and permanent disability, but in denial thereof*, it is difficult to see how the life expectancy of the assured, multiplied by the yearly disability benefits contained in the policies, or the reserve to be maintained under the policies, could either be computed to supply the requisite amount in controversy.” (Italics added.)

To the quotation from the opinion in the case of *Mitchell vs. Mutual Life Insurance Co. of New York*, 31 F. Supp. 441, cited by insurer, insured wishes to add the following from page 444 of that opinion:

“Moreover the parties litigant in this case are not trying to vitiate the contract of insurance between them.”

During the trial the insured testified as to his age. The accident policy (made an exhibit in this case) had attached thereto a copy of the insured's application in which his age was stated.

“Judicial notice will be taken * * * of the average duration and expectancy of human life, and of the Northhampton and American tables of mortality. * * *” *Jones Commentaries on Evidence*, Vol. I. Sec. 129, Page 630.

And on page 649, Sec. 134 A:

“It is hardly necessary to add that no evidence need be given of those facts of which the court should take judicial notice. * * * It has been held repeatedly that the court may refuse to hear evidence concerning that of which it will take judicial notice. * * *”

Page 654:

“* * * There is no necessity either to plead or prove any fact of which judicial notice will be taken, since it is the very essence of such facts that they are common knowledge. * * *”

d. Cases Cited by Insurer Relating to Jurisdiction

The authorities cited by insurer supporting its statement that there was not \$3000.00, exclusive of interest and costs, in controversy when suit was commenced, very clearly have no application to the present

action. A careful survey of the cases on this subject reveals the facts are not similar. In this case the insurer is attempting to cancel and void portions of the policy. Insured is asking a declaration of the meaning of the policy and that the value of rights are to be preserved and protected.

The first case cited by insurer, *Mutual Life Insurance Co. of New York vs. Temple*, 56 F. Supp. 737, was an action at law to recover payments rather than a suit in equity to preserve and protect value of right. The litigants were not trying to vitiate the policy. The only question being total and permanent disability and the accrued benefits amounted to \$200.

Elgin vs. Marshall, 106 U. S. 578, 1 S. Ct. 488, 27 L. Ed. 249, was not a declaratory judgment action. Insurer quotes from opinion which holds cases involving rights are excluded. Sec. 274d of the Judicial Code 28 U. S. C. A. Sec. 400, however, provides that the courts of the United States shall have power "to declare rights and other legal relations of any interested party petitioning for such declaration."

The case of *New England Mortgage Co. vs. Gay*, 145, U. S. 123, 12 S. Ct. 815, 36 L. Ed. 646, was merely an action in assumpsit.

Gibson vs. Shufeld, 122 U. S. 27, 7 S. Ct. 1066, 30 L. Ed. 1083. General creditors in this action sued to set

aside conveyance as fraudulent. Therein it was said that one suit of several plaintiffs or defendants who might have sued or been sued in separate actions does not enlarge the appellate jurisdiction.

Mutual Life Ins. Co. of New York vs. Moyle, 116 F. 2d 434. It is difficult to believe insurer is seriously asserting that the Moyle case and instant case are "virtually identical." Judge Parker clearly distinguishes the difference between the Moyle case involving only the right of the insured to the accrued disability payments from one where the controversy relates to the validity *or meaning* of the policy. It was said in the Moyle case:

"No controversy is alleged to exist as to the validity of the policies, but, on the contrary, plaintiff itself avers that they are valid obligations and are in full force and effect. *Nor is there any controversy as to the meaning of the policies.*" (Italics added.)

Judge Parker wrote opinions in other cases holding the court entertained jurisdiction when the validity and meaning of the policy were involved.

In *Wright vs. Mutual Life Insurance Co. of New York*, 19 F. 2d 117 and *Mutual Life Insurance Co. of New York vs. Wright*, 276 U. S. 602, 48 S. Ct. 373, 72 L. Ed. 726, the only disputed question of fact was whether the insured committed suicide or died as the

result of an accident in an action for insurance installments.

In *Button vs. Mutual Life Insurance Co. of New York*, 48 F. Supp. 168, insured sought to recover total permanent disability benefits amounting to \$700. Validity of policy not questioned nor construction of meaning asked.

Equitable Life Assur. Soc. of the United States vs. Wilson, 81 F. 2d 657. In this case there was no prayer for general relief and no pleading for declaratory relief under 28 U. S. C. A. Sec. 400.

The court said:

“All that appears from the complaint is that there is a policy in full force and effect which created two insurances, one on the life of the insured and the other on his disability. No claim is made under the life insurance, and the only claim that is made is that \$750 is due on the disability payments and unpaid by the defendant.”

Nearly all of these cases were cited to the trial court and argued by insurer in its motion to dismiss for lack of jurisdiction and were considered by the trial court in its memorandum opinion, which opinion is as follows:

“This is an action under the Federal Declaratory Judgment Act (28 U. S. C. A. 400) in which plaintiff seeks to require defendant to pay hospital expenses and weekly disability allowances

under the provisions of a policy of insurance issued by the defendant to him in 1937. Plaintiff alleges that, while the policy was in force, he became totally and permanently disabled as a result of an accident occurring on April 14, 1943. He alleges that he has a life expectancy of 29.62 years and that, under the terms of the policy, he will be entitled during his life to receive benefits amounting to \$35,400. He alleges that, up to the date of the filing of his amended complaint, benefits accrued to the extent of \$2,575. He further alleges that the defendant refuses to pay the benefits provided in the policy for the reason that it contends that prior to the accident he had changed his occupation and that, under the provisions of the policy, the liability of the defendant is limited to such portion of indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits fixed by the company for more hazardous occupation, which plaintiff alleges would be so limited in scope and value as almost to nullify any benefits. He alleges that his rights to future benefits which he seeks to preserve and protect by this action exceed the sum of \$3,000 in value. To the complaint, the defendant has interposed a demurrer and a motion to quash. By those it seeks to raise the jurisdictional question as to whether the amount in controversy exceeds \$3,000. Plaintiff objects to the consideration of this jurisdictional question under the demurrer and motion contending that they do not properly reach the question (28 U. S. C. A. 723 C-7 (c) and 126). Regardless of the tactical ineptness on defendant's part, the question is here and must be decided. *Kavourgias vs. Nicholaou Company Limited*, 9th Cir., decided March 12, 1945.

“Defendant insists that consideration of this jurisdictional question must be limited exclusively

to the allegations of the original complaint. That contention is without merit. Federal Rules of Civil Procedure 15 C (28 U. S. C. A. 723 C, 15 (c)). *Culver vs. Bell & Loffland*, 146 F. 2d 29, 31; *Alderman vs. Elgin J. & E. Ry Co.*, 125 F. 2d 971, 973; *International Ladies' Garment Workers' Union vs. Donnelly Garment Co.*, 121 F. 2d 561, 562; *Carr vs. Fife*, 156 U. S. 494, while it is true that, in determining jurisdiction, the decision must be based upon the facts that existed at the time of the commencement of the original action and it is true that a plaintiff cannot commence an entirely different action by an amended complaint, a plaintiff does have a right to insert new allegations of facts which existed at the time of the filing of the original complaint and they will relate back to the original filing. The only important factual amendment in the amended complaint here, as compared with the original, is the inclusion of the paragraph referring to plaintiff's life expectancy.

“The problem which defendant presents on the question of jurisdiction is an extremely perplexing and vexatious one. There is a sharp conflict of opinion between the Circuit Courts of Appeals which have passed on it. The question posed is whether, in a declaratory judgment action, when the indemnities already accrued are less than \$3,000, the court has jurisdiction when it is alleged that, taking into consideration the insured's life expectancy and accepting the allegation as to permanent and total disability, the value of the insured's rights will, if he lives out and is totally disabled during a sufficient period of his expectancy, amount to more than \$3,000.

“It is well settled that, in a straight action to recover disability benefits, the jurisdictional amount must be measured upon the basis of the

indemnities already accrued. *Mutual Life Insurance Co. of New York vs. Wright*, 276 U. S. 602; *Equitable Life Assur. Society vs. Wilson*, 81 F. 2d 657; *Wright vs. Mutual Life Ins. Co. of New York*, 19 F. 2d 117. This is true even though the collateral effect of the judgment in such actions may be to establish the right of the insured to recover sums far in excess of the jurisdictional amount. *Elgin vs. Marshall*, 106 U. S. 578; *Cromwell vs. County of Sac*, 94 U. S. 351. See, also, *Healy vs. Ratta*, 292 U. S. 263. The Declaratory Judgment Act does not enlarge the jurisdiction of the Federal Courts nor alter the character of the controversies which are the subject of judicial power under the Constitution. *Southern Pacific Co. vs. McAdoo*, 82 F. 2d 121; *West Pub. Co. vs. Colgan*, 138 F. 2d 320. But when the validity of the whole policy is in issue and the policy value exceeds the jurisdictional amount, the court has jurisdiction in a declaratory judgment action even though the accrued liability for disability payments is less than \$3,000. *Bell vs. Philadelphia Life Ins. Co.* 78 F. 2d 322; *Pacific Mut. Life Ins. Co. of California vs. Parker*, 71 F. 2d 872; *Ginsburg vs. Pacific Mut. Life Ins. of California*, 69 F. 2d 97. In that aspect, obligations it may be compelled to pay in the future are not merely contingent and enter into the amount in dispute. In determining what they are, the life expectancy of the insured may be considered. *Thompson vs. Thompson*, 226 U. S. 551; *Brotherhood of Locomotive Firemen & Enginemen vs. Pinkston*, 293 U. S. 96; *New York Live Ins. Co. vs. Swift*, 38 F. 2d 175; *Jensen vs. New York Life Ins. Co.* 50 F. 2d 512.

“The Court’s jurisdiction in cases in which the basic facts substantially corresponded to those alleged here has been sustained in *Ballard vs. Mutual Life Ins. Co. of N. Y.*, 5th Cir., 109 F. 2d 388;

Franzon vs. E. I. Du Pont de Nemours & Co., 3d Cir., 146 F. 2d 837; *Columbian Nat. Life Ins. Company vs. Goldberg*, 6th Cir., 138 F. 2d 192. See, also, *Davis vs. American Foundry Equipment Co.*, 7th Cir., 94 F. 2d 441. It has been denied in *Mutual Life Ins. Co. of New York vs. Moyle*, 4th Cir., 116 F. 2d 434; *Mutual Life Ins. Co. vs. Temple*, 56 F. Supp. 737; *Edelmann vs. Travelers Ins. Co. of Hartford, Conn.*, 21 F. Supp. 209.

“Unfortunately this is not a question of which disposition can be made through the simple mathematical process of comparing the number of decisions. In *Mutal Life Ins. Co. vs. Moyle*, *supra*, Judge Parker wrote an opinion which cannot be ignored even in the face of the weight of authority. No one can deny the correctness of his statement that litigants ‘may not be permitted, under the guise of seeking declaratory judgments, to drag into federal courts the litigation of claims over which, because involving less than the jurisdictional amount, it was never intended that the federal courts should have jurisdiction.’ There is much logic in his statement: ‘A declaratory judgment can be had, however, only with respect to a justiciable controversy; and the justiciable controversy here, as we have seen, extends only to the accrued disability benefits, as the conditions entitling insured to such benefits may change at any time.’ I can see no logic, however, in distinguishing between cases in which the entire policy is attacked and that in which only the questions of the right to the benefits is raised. If the amount of disability benefits is too uncertain in one instance, it should be too uncertain in the other. ‘The conditions entitling insured to such benefits may change at any time’ regardless of whether the attack is on the whole contract or just a part of it. In thus holding, the *Moyle* case

runs counter to the Supreme Court's statement in *Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 242, which reads as follows: 'On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls not for an advisory opinion upon a hypothetical basis but for an adjudication of present right upon established facts.

"That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.'

"On this phase of the case, I feel myself bound by the recent decision of the Ninth Circuit Court of Appeals in *American General Ins. Co. vs. Booze*, 146 F. 2d, 329, 331. That was an action for a declaratory judgment by an insurance company which asked the court to determine whether or not it was required to defend an action which

had been commenced against its assured. The amount of liability to which the insurance company might be subjected was undetermined. It might be less or much more than \$3,000. In that case, the entire policy was not attacked. The insurance company admitted that its contract was in full force and effect. It alleged that the individual for whose death claim was made, was, at the time of his death, covered by the Workmen's Compensation Act of California and that, therefore, his heirs were not entitled to recover from the plaintiff's assured and, therefore, asked the court so to interpret its contract as to relieve it of the obligation to defend the action against its assured or to pay a judgment which might be rendered against him. The issue was raised that because there was no certainty that the amount of that judgment would exceed \$3,000, therefore the amount in controversy did not exceed \$3,000. Without discussion, the court disposed of the contention as being without merit.

“It is true that the policy in the Booze case obligated the company to pay up to \$10,000. That however, was only the limit of its obligation. It was just the ceiling above which its contract could not go. That is a distinction which few courts have made but which must be made. It is usually only upon death or the happening of a certain event (such as the loss of an eye or a limb) that the company ‘contracts’ to pay a certain amount. The principal sum named to be paid in the event of the occurrence of other events or the existence of certain conditions is the limit of liability. For example, in the policy involved in this case, there are two equally important provisions for indemnity. The first is the ‘Single Principal Sum \$1,000.’ The other is the ‘Single Weekly Indemnity \$25.’ This plaintiff’s claimed right under the policy is to have paid to him the

sum of \$25 per week as long as he lives if he is permanently and totally disabled. That right has been placed in doubt by the Company's claim that he lost it because he changed his occupation. The amount in controversy is the value of that which it is sought to be declared free of doubt. It cannot be claimed with any logic that a difference may exist simply because of the manner in which that doubt has been raised. There is an actual controversy admitting of relief. The jurisdictional question turns on the value of the right which is controverted. The Ninth Circuit Court of Appeals definitely recognized this principle when, in *Equitable Life Assur. Co. vs. Wilson*, *supra*, p. 660, it underlined the Supreme Court's language as follows: "The Supreme Court draws the distinction between the two in the following language: "This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds \$3,000, the District Court has jurisdiction." 293 U. S. 96, 99, 100, 55 S. Ct. 1, 2, 79, L. Ed. 219.'

"Defendant's demurrer, which I have considered as a motion to dismiss, must be overruled and its motion to quash denied."

f. Federal Jurisdiction Depends on the Facts at the Time Suit Is Commenced.

Insured is in accord with the authorities cited by insurer to the effect that jurisdiction depends on the facts at the time suit is commenced, but not with insurer's statement that jurisdiction depends upon facts *alleged* when suit is commenced. This point is thor-

oughly discussed in the trial court's memorandum opinion.

IV. QUESTION OF PRO-RATING

The trial court held the case *Nordin vs. Commercial Casualty Ins. Co.*, 176 Wash. 59, 28 P. (2d) 259, is decisive of this case.

That case and the instant case are identical. In the Nordin case, as in the present case, the same insurer, the Commercial Casualty Ins. Co. was seeking to escape liability by virtue of the protection of the same statute.

In each case the liability of the insurer had been established, but the insurer was relying upon the pro-rating clause of the policy to enable it to reduce the amount of its liability to one-fifth or less of that stated in the written contract of insurance.

Since the accident policy in each case recited it was the *entire contract* of insurance, except as it may be modified by the company's classification of risks. It was necessary for the insurer to establish a classification of risks, filed with the commissioner, which modified *this policy*, as otherwise the indemnity provided in the contract would be unaffected.

The Washington law in Rem. Rev. Stat. 7233, provides that no accident insurance policy shall be issued or de-

livered until a copy of the form thereof and of the classification of risks *pertaining thereto* have been filed with the insurance commissioner. Said section reads as follows:

“No policy of insurance against loss or damage from the sickness, or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and the classification of risks, if more than one class of risks is written and the premium rates pertaining thereto have been filed with the insurance commissioner; * * *”

The only classification of risks filed by insurer either at the time of the Nordin case or up till April 14, 1943, is the black manual, filed May 29, 1929, “Plaintiff’s Exhibit D” and that classification of risks does not *pertain* to the Star Accident Policy No. 14H 5110, just as it did not pertain to form 104-A in the Nordin case. Just as in the Nordin case, there is no proof that Star Accident Policy No. 14H 5110 is identical to the forms mentioned in the black manual to which the filed classification of risks apply. It will be noted that the black manual is so constructed that new matters may be added. At the front of the black manual containing the classification of risks is a list of forms of policies to which the classification of risks pertain. This does not include Star Accident Policy 14H 5110, Cas. A. & H. 5643.

The red manual, "Defendant's Exhibit I," is an instruction book for agents. It is prepared for distribution to all the agents of the several companies of the Loyalty Group of accident and health companies. The leaves are tightly bound and any addition is pasted in. The first page begins with:

"Underwriting Instructions
 "Concerning
 "Accident and Health Business

"The Company's rules and instructions governing the conduct of the Commercial Accident and Health business will be found in the following pages. The Company reserves the right to change these rules at any time.

"The rules, as issued should be carefully read by every agent. Lack of knowledge of the Company's instructions is the cause of much unnecessary correspondence, embarrassment and delay."

Counsel for insurer stated: "I contend that the red manual is the one upon which we have a right to depend." (Tr. 112.) But the Star Accident Policy No. 14H 5110 is not mentioned in the red manual and we are unable to understand in just what manner it could pertain to a policy not mentioned. Counsel for insured admitted that Star Accident Forms vary (Tr. 117).

It is contended by the insurer that it has complied with the above state statute, but there is no foundation for such contention.

The Star Accident Policy, No. 14H 5110 was filed with the insurance commissioner on June 3, 1929. Nearly sixteen months later the red manual was filed. That manual did not refer to the policy in suit and there is nothing to indicate that it was ever attached to said policy form, nor was it attached when the insurance commissioner's records were subpoenaed.

The insurer further asserts that it has only one classification of risks. It is improbable that the insurer has less classifications now than when the *Nordin* case was decided.

The insurer not having filed its classification of risks pertaining to the said policy, the trial court did not pass upon the question of change of occupation, just as the court did not pass upon that question in the identical case of *Nordin vs. Commercial Casualty Insurance Company, supra*.

The primary purpose of filing the classification of risks pertaining to each policy, is, under the statute, the only way in which the insurer can modify the written contract of insurance, since the relation between the insurer and insured is purely a contractual one. The policy in suit reads in part:

“This policy * * * contains the entire contract of insurance, except as it may be modified by the company's classification of risks. * * *”

Quoting further from the Nordin case, at page 65:

“The policy recites in Section A, above quoted, that it is the *entire contract* of insurance, except as it may be modified by the company’s classification of risks. * * * * * It will be remembered that the classification, when filed, must pertain to the form of policy issued. It was, therefore, incumbent upon respondent to establish a classification of risks, filed with the commissioner, which modified *this policy*, as otherwise the indemnity provided in the contract would be unaffected.

“It will be borne in mind that the policy here in suit is form 104-A. The respondent sought to prove, as it was required to do, that a copy of its classification of risks pertaining to form 104-A had been filed in accordance with law. The evidence, however, only establishes that the classification of risks as filed pertain to ‘New Ultimate Accident Policy Form 2-H.’ There is no evidence that a classification of risks pertaining to *form 104-A* had ever been filed or approved. *Form 2-H* does not appear in the record, and the evidence apprises us of nothing concerning either its form or its content. There was no proof that form 104-A and form 2-H were identical, or even similar. We can not assume that they were the same.

“It is a matter of common knowledge that many forms of policies are filed with the insurance commissioner by many different insurance companies, and that a particular company may, from time to time, successively file many different forms. Differences in classifications of risks may result from differences in forms of policies. Under the statute the form of classification of risks must *pertain* to the form of policy filed.

There must, therefore, be some record connection between the two.

“Respondent was seeking to escape liability in this case by virtue of the protection of the statute. To escape liability, it was necessary for it to bring its proof within its defense. This it failed to do. Its liability is, therefore, measured by the terms of the contract of insurance, unaffected by any extraneous and unconnected classification of risks not pertaining to the policy.” (Emphasis by court.)

It is the further contention of insurer that if the opinion of the trial court is upheld, it would necessitate the filing of twenty or more red manuals with the insurance commissioner. The attention of the Honorable Court is respectfully directed to the black manual (plaintiff's exhibit “D”).

In the front of this manual is a page upon which are designated the policy forms to which the classification of risks therein apply, and to comply with the statute, insurer need only file one new page with added form number to those already designated, and instruct the insurance commissioner to substitute such new page for the same numbered page in the black manual. Examination of the said manual will show this is the customary procedure in making any changes in such classification of risks, and usually the date is stamped on the new page.

In the above quoted case, policy form 2-H was not before the court, but in the present case all matters relating to the commercial accident and health policies of the insurer filed with the state insurance commissioner, were before the trial court. The trial court heard the testimony of witnesses and the argument of counsel relating to said records and, after examining the subpoenaed records, rendered its opinion, which is in part as follows:

“I am not going to pass upon the question of the change of occupation, nor determine the question of whether or not it needs to be voluntary. I am expressing no opinion on that one way or the other, and I am not deciding the case upon the basis of estoppel, although I will say it occurs to me there was some obligation on the part of this company, knowing this man was in the National Guard, and knowing that the National Guard was mobilized in 1941, there was some obligation on its part to not accept the premiums from which he was to get \$25.00 a week and not let him know if he got injured as he did here that they intended only to pay him \$5.00 a week, and make certain mental reservations on it.

““I am deciding the case upon the basis of the Nordin case. Counsel refers to it as a technicality. It may be. If it was a technicality it was pointed out to this particular company very definitely and emphatically by the Supreme Court of the State of Washington, and they knew it was not a mere technicality before, and they should have complied with the requirements of the Supreme Court’s ruling. I see no question about the company’s

failure to comply with the statute as the statute has been interpreted by the Supreme Court.

“I am reading from *Nordin vs. Commercial Casualty Insurance Company*, 176 Washington, 64:

“ ‘The determinative feature of this case, as we view it, rests upon the respondent’s failure to establish the fact that it had filed with the Insurance Commissioner of this state a copy of its classification of risks pertaining to the policy in suit, as required by the statute.

“ ‘*Rem. Rev. Stat., Sec. 7233*, provides that no accident insurance policy shall be issued or delivered until a copy of the form thereof and of the classification of risks pertaining thereto have been filed with the Insurance Commissioner.

“ ‘Thus it will be seen that the policy is to be held a valid and binding contract, but, in so far as it conflicts with *Sec. 7233, supra*, the provisions of the latter shall govern. Expressed according to result, the policy does not draw to itself, as part thereof, any classification of risks therein referred to, unless a form of such classification pertaining to the particular policy has been filed in accordance with law.’

“Now counsel for the defendant takes the position that the defendant’s exhibit ‘1’ was controlling at the time the policy was issued.

“This is the manual of the Loyalty Group. It is not even a manual of this particular insurance company, but a manual of the Loyalty Group, of which this insurance company is a member, and it limits the risk on all policies issued by whatever companies are members of the Loyalty Group.

"The testimony of the witness from the Insurance Commissioner's office that they filed it with the Star policy at the time it was filed, must be construed to be an attempt to comply with the classification requirements pertaining to the policy, and not in a classification of the limitations of the risk. It has classes A, B, C and D, and is the premium rate for those accident policies. These other papers that were filed are nothing more than premium rates.

"I agree with Judge Askren that I cannot conceive of this company, having gone through this experience once, that they would turn around and do it just as bad over again, but after this case was decided in January, 1934, they had on file their manual for the whole Loyalty Group of insurance companies, not referring to any policy, and then they say that these papers they filed of statements of premium rates are sufficient to meet the requirements.

"It is true they did not have all the evidence before them in that case that they wanted to have, but you have all of it here, and there just isn't anything here that the statute was complied with and that they filed any classification pertaining to this policy. They didn't even file a classification of risks pertaining to the Commercial Casualty Insurance Company, but filed a general classification of risks for all the companies in the Loyalty Group.

The statement by the insurer that the state insurance commissioner was satisfied with the purported filing of classification of risks by the insurer stands unsupported, but even if true, it is a well-established principle of law that no state officer or employee has

the power to waive compliance with the statutes of the state.

It is respectfully submitted that the district court was acting entirely within its judicial discretion in assuming jurisdiction in this case; and further, under the case of *Erie vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, it was the duty of the Federal court to follow the state decision in the case of *Nordin vs. Commercial Casualty Insurance Company*, 176 Wash. 59.

Respectfully submitted,

JUNE FOWLES

C. W. HALVERSON

Attorneys for Appellee.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY,
a New Jersey corporation, *Appellant,*

vs.

LESLIE O. FOWLES, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation,	<i>Appellant,</i>	}	No. 11139
vs.			
LESLIE O. FOWLES,	<i>Appellee.</i>		

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT

Appellee, in restating the factual background of the litigation makes the statement on Page 2 of his brief that no offer of payment, either in the amount demanded by the insured or the prorated amount alleged to be due by the insurer, has been made. There is nowhere in the record any evidence whether or not such offer of settlement has been made and appellant believes that the injection of this new fact, for the first time on appeal, is improper. If the appellee determines to inject this irrelevant matter, at this stage of the proceedings, in fairness he should admit that which is a fact, namely, that several offers, in excess of the amount appellant alleges to be due under

the policy, were made to the appellee, in order to settle this case without the necessity of litigation.

I.

NECESSITY OF JURISDICTIONAL AMOUNT IN DECLARATORY JUDGMENT ACTION.

The appellee under the headings of I. and II. and III. of his brief, at various times indicated that the law is to the effect that the court has jurisdiction to entertain a Declaratory Judgment Action, even though the jurisdictional amount of \$3000.00 is lacking. The appellant in his opening brief used no time or space on this point, assuming that it was too well understood to require argument, that the jurisdictional amount of \$3000.00 was a prerequisite to the bringing of an action in the Federal Court, regardless of whether or not this action was by virtue of the Declaratory Judgment Statute. Appellee, in making this argument before the Ninth Circuit Court of Appeals has picked the one court, which more than any other, has repeatedly asserted the proposition that they have no power to entertain litigation brought by virtue of the Declaratory Judgment Statute, if the minimum jurisdictional amount is lacking.

A succinct statement of the rule is given by Judge Parker of the Fourth Circuit, as follows:

“The Federal Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction.” *Pacific Mutual Life Insurance Co. v. Parker*, 71 F.(2d) 872.

One of the leading cases enunciating the rule of law set forth by the appellant herein was that of *So. Pac. Co. v. McAdoo*, 82 F.(2d) 121, wherein it was definitely held that the statutory amount of \$3000.00 was necessary before a Federal court could entertain jurisdiction of an action, despite the fact that the action was brought under the Federal Declaratory Judgment Act. In that proceeding, a case was brought in the Federal District Court under the provisions of the Federal Declaratory Judgment Act, and the court, in deciding that the case must be dismissed for lack of the jurisdictional amount, used the following language.

“The Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the Federal courts if affirmative relief were being sought (citing cases). The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction.”

This court, in the case of *Gavica et al. v. Donough*, 93 F.(2d) 173, again affirmed the holding in the case of *So. Pac. Co. v. McAdoo*, *supra*, and reiterated the statement that the Declaratory Judgment Act cannot endow a district court with jurisdiction which it lacks by reason of the insufficiency of the amount in controversy.

Prof. Borchard in his treatise on *Declaratory Judgments*, second edition, page 233, says:

“It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it

the policy, were made to the appellee, in order to settle this case without the necessity of litigation.

I.

NECESSITY OF JURISDICTIONAL AMOUNT IN DECLARATORY JUDGMENT ACTION.

The appellee under the headings of I. and II. and III. of his brief, at various times indicated that the law is to the effect that the court has jurisdiction to entertain a Declaratory Judgment Action, even though the jurisdictional amount of \$3000.00 is lacking. The appellant in his opening brief used no time or space on this point, assuming that it was too well understood to require argument, that the jurisdictional amount of \$3000.00 was a prerequisite to the bringing of an action in the Federal Court, regardless of whether or not this action was by virtue of the Declaratory Judgment Statute. Appellee, in making this argument before the Ninth Circuit Court of Appeals has picked the one court, which more than any other, has repeatedly asserted the proposition that they have no power to entertain litigation brought by virtue of the Declaratory Judgment Statute, if the minimum jurisdictional amount is lacking.

A succinct statement of the rule is given by Judge Parker of the Fourth Circuit, as follows:

“The Federal Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction.” *Pacific Mutual Life Insurance Co. v. Parker*, 71 F.(2d) 872.

One of the leading cases enunciating the rule of law set forth by the appellant herein was that of *So. Pac. Co. v. McAdoo*, 82 F.(2d) 121, wherein it was definitely held that the statutory amount of \$3000.00 was necessary before a Federal court could entertain jurisdiction of an action, despite the fact that the action was brought under the Federal Declaratory Judgment Act. In that proceeding, a case was brought in the Federal District Court under the provisions of the Federal Declaratory Judgment Act, and the court, in deciding that the case must be dismissed for lack of the jurisdictional amount, used the following language.

“The Declaratory Judgment Act (Jud. Code Sec. 274d, 28 U.S.C.A. Sec. 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the Federal courts if affirmative relief were being sought (citing cases). The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction.”

This court, in the case of *Gavica et al. v. Donough*, 93 F.(2d) 173, again affirmed the holding in the case of *So. Pac. Co. v. McAdoo*, *supra*, and reiterated the statement that the Declaratory Judgment Act cannot endow a district court with jurisdiction which it lacks by reason of the insufficiency of the amount in controversy.

Prof. Borchard in his treatise on Declaratory Judgments, second edition, page 233, says:

“It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it

manifestly opens to prospective defendants—and plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed.”

In other words the Federal Declaratory Judgment Act can only apply to causes which the district courts might otherwise be empowered to hear and determine.

West Publishing Company v. McColgan, 138 F.(2d) 320.

As opposed to the above citations, the appellee, in his argument, cites cases enunciating a general principle as to the discretion of the courts to assume or reject jurisdiction in Declaratory Judgment matters, which citations, upon investigation have no relevancy as to the question of whether or not the court may entertain a case where the jurisdictional amount is lacking.

II.

VALIDITY OF POLICY NOT IN ISSUE

The major portion of the appellee’s brief is devoted to attempting, by a tortuous process of reasoning, to prove that the appellant has denied the validity of the policy of the insured. This, despite the fact that the pleadings and evidence indicates with clarity the fact that the appellant has at all times admitted the existence and validity of the policy. The reason for the appellee’s attempt to misconstrue the cases on this subject is obvious, in that unless he can convince the court that the policy was attacked, he realizes that he clearly falls short of the jurisdictional amount required for federal jurisdiction.

Schedule 8 of the policy relating to hospital indem-

nity provides that the company will pay, among other thing, *the amount for hospital expense*. Obviously if the appellee is treated without expense at a Government Hospital, he cannot prove any hospital expense and hardly can it be said that the appellant is questioning the wording of the policy by objecting to making a payment under this clause, which the appellee himself is not called upon to pay.

1. Question of change of occupation.

There is a standard clause in the policy in suit relating to a modification in the event of the change of occupation of the insured. Again the appellee on Page 13 of his brief makes a strained attempt to show that it would be necessary to construe the policy if it were determined that the insured had changed his occupation. Inasmuch as the lower court did not pass upon this aspect of the case it is not determined necessary to cite cases in support of appellant's contention, but it can be said that there is an unbroken line of cases to the effect that if it is indicated that an insured changes from the classification of occupation set forth in the policy to one in a more hazardous group, he is not entitled to the full indemnity set forth under the terms of the policy, and it makes no difference whether or not, at the time of his injury, he was not actually engaged in the more hazardous occupation to which he had changed. This does not call for any construction of the policy but merely the determination of the disassociated fact of whether or not the assured had actually changed his occupation.

It hardly seems necessary to respond to the argument made on Page 13 of the appellee's brief to the

effect that there was a controversy regarding the insured's disability, when the appellee follows up his argument by admitting that the total disability to the date of trial was stipulated. Even were this not so, the question of whether or not the insured were totally disabled is a factual one. The denial of total disability in a case like this is not a denial of the validity of the policy.

2. Appellee's Argument that policy was attacked.

On page 16 of his brief, the appellee makes the following statement which is the crux of his whole argument and on which he must stand or fall on the question of jurisdiction. The statement is as follows:

“Where validity of policy is being attacked, the face value of the policy may be added to accrued benefits.”

With the foregoing statement, the appellant is in full accord and agrees that if the validity of the policy herein were being denied, that the face value thereof could be added to the accrued benefits. Appellee has failed to indicate one scintilla of proof either in the pleadings or evidence, wherein the appellant has attempted in any way to attack the validity of the policy. All of the following quotations on this subject, in appellee's brief, indicate clearly that they are cases, where the insurance company involved had attempted to lapse, cancel or otherwise cause the forfeiture of the policy, and therefore such citations are not relevant to the case being discussed.

In the case of *Pacific Mutual Life Insurance Co. v. Parker*, 71 F.(2d) 872, quoted on pages 18 and 19 of

the appellee's brief, the quoted section contains the following language:

"What is asked by the bill is not merely that prosecution of the suits that have been instituted be restrained but also that the policy be *cancelled* and *surrendered*." (Italics ours)

On page 19 of the appellee's brief, counsel for the appellee, attempts to open the door to jurisdiction by alleging that the amount of this policy which would be payable on death is a subject which should afford the appellee access to the Federal Court, despite the fact that this provision of the policy is not in issue. In support of this odd contention, the appellee on page 19 of his brief quotes Judge Parker in the case of *Pacific Mutual Life Insurance Company v. Parker, supra*, to the effect that death benefits in accident policies come within the state statute prescribing incontestable periods for such policies. This suggestion was made by the insurance companies involved in that case to protect them from being harmed by the running of the period after which the policy would be incontestable, but the following is the language which Judge Parker used in passing upon this subject.

"The policies here, however, contain no incontestable clause. Reference has been made to sections 7986 and 7987 of the South Carolina Code of 1932, which prescribe an incontestable period of two years for life insurance policies. There is a question as to whether this statute applies to the disability insurance features of policies; but the question need not be answered here, as equity jurisdiction would not exist in any event. If the limitation of the statute be appli-

cable, it is clear that it had already run at the time of the institution of the suit, as the policies were issued in January, 1925, and the suit for cancellation was not commenced until September, 1933. In that case, the policy would have become incontestable before suit, and the company would have no rights as to contestability for equity to protect. If it be not applicable, then there is no limitation on contestability and no reason for equity to intervene lest the policy become incontestable as a result of the company's inaction."

3. Life Expectancy.

Each of the cases cited by the Appellee, in an attempt to show that the life expectancy of the insured could be shown as a basis for future benefits not yet accrued, embrace a set of facts where again the company in question sought to cancel or nullify the policy. No case is cited where the life expectancy of the plaintiff was allowed to be shown where the validity of the policy was not in issue and attempt to cancel had not been made.

No citation is given which indicates that judicial notice will be taken on the life expectancy of the insured, where the policy was not sought to be cancelled and further where there was no evidence of the age of the insured or of his life expectancy produced at the trial.

The appellant has taken this appeal from the decision of the lower court and particularly from that part of the decision which refuses to dismiss this case on the ground that the requisite jurisdictional amount was not involved. Starting on page 27 of his brief,

the appellee goes through the curious procedure of trying to sustain his position by quoting the memorandum opinion of the Judge from whose decision this appeal is being taken. This despite the fact that the memorandum opinion is set out in full in the statement of facts heretofore filed in this court. It is submitted that if the memorandum opinion of the court below, and the judgment based on that opinion, is in error, and the appellant alleges that it is, that this error is not cured by being adopted by the appellee for support of the decision which is being attacked by this appeal.

CONCLUSION

Stripped of its non-essentials, the only contention which is seriously urged in the brief of the appellee is that the validity of the policy involved in this case was being attacked or that the policy was sought to be cancelled and that therefore its future benefits should be added to the amount of the accrued disability at the time of the suit.

It is respectfully submitted that neither evidence nor legal citations have been produced by the appellee which support his position. It is further submitted that the lower court was entirely without jurisdiction to entertain this case and that upon the authority of the cases cited in the opening brief of the appellant, the action should be dismissed.

Respectfully submitted,

WILLIAM J. MADDEN,

RYAN, ASKREN & MATHEWSON,

Attorneys for Appellant.

No. 11142

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. M. O'CONNOR, STELLA M. O'CONNOR, W.
H. MORRISON and R. J. MIEDEL,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

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Rotary Colorprint, 661 Howard Street, San Francisco

PAUL P. O'BRIEN,
CLERK

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United States
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In the Northern Division of the United States District Court for the Northern District of California

Civil No. 4158R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40.34 ACRES OF LAND IN THE COUNTIES OF PLACER AND EL DORADO, STATE OF CALIFORNIA, CENTRAL PACIFIC RAILWAY COMPANY, a Corporation. SOUTHERN PACIFIC LAND COMPANY, a Corporation; GRACE B. MAITHER, GRACE B. MAITHER, as Administratrix of the Estate of A. F. Maither, Deceased; MARGARET V. McDONALD, MARY E. FOWLER, JAMES G. MAITHER, THE EL DORADO AND PLACER COUNTIES GOLD MINING & POWER COMPANY, a Corporation; D. B. RICHARDS, as Trustee; CHARLES BONE, HEDWIG B. ENGLE, W. J. GIRARD, CARL VON DER MEHDEN, A. B. WHEELER, F. M. DUNN, W. D. PENNYCOCK, W. D. STEVENS, B. J. CORRIGAN, GEORGIA MAITHER, ADA L. THRELKELD, F. M. O'CONNOR, STELLA O'CONNOR, R. J. MIEDEL, R. B. SOMERBY, W. H. MORRISON, W. F. FISHER, AMERICAN RIVER GOLD MINING COMPANY, a Corporation; FRED I.

GREEN, also known as F. I. GREEN; M. L. CUMMINGS, H. A. McKINSTRY, J. A. WARE, F. J. FOSTER, J. G. MAITHER, SUSIE M. MAITHER, GEORGE Z. JOHNSON, JOHN W. KILLINGER, C. W. FLETCHER, JACK WARD, IRENE GANNETT, [1*] JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR, JOHN DOE FIVE, JOHN DOE SIX, JOHN DOE SEVEN, JOHN DOE EIGHT, JOHN DOE NINE, JOHN DOE TEN; JANE DOE ONE, JANE DOE TWO, JANE DOE THREE, JANE DOE FOUR, JANE DOE FIVE, SAM BLACK CORPORATION ONE, SAM BLACK CORPORATION TWO, SAM BLACK CORPORATION THREE, SAM BLACK CORPORATION FOUR, SAM BLACK CORPORATION FIVE. All persons in occupancy of or having or claiming any interest in any of the property described in this complaint, or in the just compensation to be determined for the taking thereof, and also unknown owners, claimants, representatives, successors and assigns of said defendants,

Defendants.

COMPLAINT FOR CONDEMNATION

To the Honorable Judges of the District Court of the United States, in and for the Northern District of California.

*Page numbering appearing at foot of page of original certified Transcript of Record.

Comes now the United States of America, the plaintiff in the above-entitled cause, by Frank J. Hennessy, United States Attorney for the Northern District of California, and G. B. Hjelm, Assistant United States Attorney for said District, as attorneys on behalf of the United States of America, as plaintiff herein, on application of the Secretary of War of the United States, and under direction of, and by authority of the Attorney General of the United States, and complains and alleges:

I.

That said plaintiff during all the times herein mentioned was and is a sovereign empowered and authorized to acquire by purchase, or by the exercise of the power of eminent domain, any real estate, or any interest therein, wherever situate within its jurisdiction, necessary for any public use of the plaintiff.

II.

That this is a suit of a civil nature brought by said plaintiff under the authority of and pursuant to the provisions of an Act of Congress approved April 24, 1888 (25 Stat. 94, Section 591, Title 33 U. S. Code), and an Act of Congress approved August 30, 1935 (Public No. 409—74th Congress, H. R. 6732) entitled “An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes,” and “Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress,” authorizing the acquisition by the United States

of America by purchase and condemnation of any estate, right, title and/or interest in and to the real property hereinafter described. [3]

III.

That said Acts of Congress set forth in the paragraph last aforesaid, together with said Rivers and Harbors Committee Document No. 50, authorize the Secretary of War to acquire by purchase and condemnation any estate, right, title and/or interest in and to the real property hereinafter described not now held, owned, and/or possessed by the United States of America for the purpose of for a period of two years from and after the time of the granting and entry of an Order by this Court granting to the United States of America immediate possession of said land, removing concrete aggregates therefrom and from out the same and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, all of which is in furtherance of the construction and maintenance of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River in the Northern Division of the Northern District of California, which said Ruck-a-Chucky Dam and Reservoir is a project, among others, of preventing the flow of debris resulting from hydraulic mining in and upon and natural erosion which may accumulate from, the watershed of the said Middle Fork

of the American River, at and above, the place on said river where said Ruck-a-Chucky Dam and Reservoir is being constructed, down the course of said river and thence down the American River into the Sacramento River, and preventing such debris and accumulations from such erosion from obstructing, impeding and interfering with navigation in the navigable portions of the said rivers.

IV.

That in the prosecution of the project for the control of debris in the Sacramento River and its tributaries in the State of California, authorized by the River and Harbor Act [4] of August 30, 1935, the Secretary of War is preparing to construct the Ruck-a-Chucky Dam and Reservoir on the said Middle Fork of the American River, and for the purpose of carrying out said project of constructing said Ruck-a-Chucky Dam and Reservoir, the Secretary of War has selected for acquisition by the United States of America a right of uninterrupted use and occupancy of the land hereinafter described, for a period of two years from and after the time of the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and

proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir, and that in the process of removing said concrete aggregates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in manner as follows:

The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard $\frac{1}{4}$ " screen and a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed, and operated by the owner, and, except as specifically indicated below, without cost to the United States of America. [5]

(A) All material will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard $\frac{1}{4}$ " screen;

(b) All material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery devices in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install, and operate gold recovery devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen. [6]

(b) A vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, but passes a standard 1" screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 per cent.

That in the event said owners, R. J. Miedel, F. A. O'Connor and Stella O'Connor, shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event the plaintiff shall have the option to either take the said concrete aggregates without recovery

of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants, which said land consisting of 40.34 acres, more or less, is situate in the County of Placer and the County of El Dorado, State of California, and is more particularly described as follows, to-wit:

All that certain real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as follows:

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N. R. 9 E., M.D.B.&M., said Point bearing S. $89^{\circ} 55'$ W. and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N., R. 9 E., M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23, thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23, [7] thence along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or

less, to the northeast corner of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the E $\frac{1}{2}$ of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 23, S. 2° 52' E., 2,677.0 feet, more or less, to the point of beginning, and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

That a map or plat showing the land above described with the river and lands adjacent thereto, is hereto annexed, marked Exhibit "A" and made a part hereof.

V.

That the estate or interest in and to the said land described in paragraph IV of this complaint, which the plaintiff intends to seek, take, acquire, condemn, hold and own by these proceedings, is a right, power, and privilege of uninterrupted use and occupancy of the said land described in said paragraph IV, for a period of two years from and after the time of the granting and entry of an order by this Court, granting to the United States of America immediate possession of said land for the purposes of, and with the right, power, and privilege of, during said period of two years, taking and removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Rucka-Chucky Dam and Reservoir project, and with the

right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of the removal of said materials from and out of said land for purposes and uses as aforesaid, [8] provision for recovery of the gold contents of such material to be made, upon terms, conditions, and in manner as set forth in paragraph IV of this complaint commencing at line 25, page 4, and ending at the word "defendants" in line 15, page 4b; such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.

VI.

That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937. [9]

VII.

That in the opinion of the Secretary of War and the Chief of Engineers of the War Department,

it is necessary, advantageous and in the interests of the United States that the right of use and occupancy described in paragraph V hereof in and to said land described in paragraph IV hereof be acquired by judicial proceedings for the use aforesaid, and the Secretary of War has so determined and has approved of such acquisition.

VIII.

That the Secretary of War of the United States, pursuant to the provisions of the foregoing Acts of Congress, has endeavored to acquire said quantum of estate as set forth in paragraph V hereof for the purposes aforesaid, in and to said land described in paragraph IV hereof, but has been unable to acquire the same up to this time at prices and upon conditions and terms deemed by him to be reasonable, and therefore has determined, and is of the opinion, that it is necessary, advantageous and in the interests of the United States that said quantum of estate be acquired by judicial proceedings, and has made application to the Attorney General of the United States to institute such proceedings, and the Attorney General of the United States, in pursuance of said application, has directed the United States Attorney for the Northern District of California to institute these condemnation proceedings.

IX.

That pursuant to an Act of Congress approved July 18, 1918 (40 Stat. 911 (Ch. 155, Sect. 5; Section 594, Title 33, U. S. Code), the plaintiff, upon the

filing of the complaint in this proceeding, becomes entitled to the right to take immediate possession of said land, the portion of said Act relating to immediate possession being in the words and figures following: [10] “Whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress; Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States

in order that such compensation may be promptly ascertained and paid.”

X.

That the Secretary of War of the United States, pursuant to the provisions of Section 5 of the said River and Harbor Act of July 18, 1918, has determined and is of the opinion that it is necessary, advantageous and in the interests of the United States that an order be obtained from this Court authorizing the said Department to take immediate possession of the said land, and the said United States Attorney has been authorized and directed by the Attorney General of the United States to take proper proceedings herein to secure such order from the above named Honorable Court.

XI.

That said public use and improvement proposed herein to be made by the United States of America is planned and located in the manner which will be most compatible with the greatest public good and the least private injury. [11]

XII.

That all preliminary steps required by law have been taken to entitle plaintiff to institute these proceedings.

XIII.

That the purposes for which plaintiff is taking said quantum of estate in and to said land are necessary and constitute a public use, and that the

use to which said property is to be applied is a use authorized by law.

XIV.

That so far as the plaintiff has been able to ascertain the lands hereinbefore described are not devoted to public use.

XV.

That the title and the fee in and to said land described in paragraph IV hereof is vested in the United States of America and is subject only to alleged outstanding mineral rights claimed by said defendants;

XVI.

That the above named defendants, and each of them, claim to have, own or hold some ownership, right, title, estate, interest, claim, demand or lien in, to or upon said property hereinbefore described, and that the names of all the owners and claimants of any interest, right or claim in and to the said land so far as is known to the plaintiff, are set forth in the title of this action.

XVII.

That there may be persons unknown who may have some right, title, estate, interest, claim, demand or lien in, to, or upon said property hereinbefore described and for that reason all unknown owners, claimants, lienors and lessees having or claiming to have any right, title, estate, interest, claim, demand or lien, and all occupants and users and holders and owners of, and claimants to easements in, upon, over, across [12] or through the

lands hereinbefore described, and all unknown assignees and successors of the parties named herein are made parties defendant to this complaint.

XVIII.

That the defendants, John Doe One, John Doe Two, John Doe Three, John Doe Four, John Doe Five, John Doe Six, John Doe Seven, John Doe Eight, John Doe Nine, John Doe Ten, Jane Doe One, Jane Doe Two, Jane Doe Three, Jane Doe Four, Jane Doe Five, Sam Black Corporation One, Sam Black Corporation Two, Sam Black Corporation Three and Sam Black Corporation Four and Sam Black Corporation Five, are sued and designated herein by fictitious names for the reason that their true names are unknown to the plaintiff, but that plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by proper amendments; that said defendants, and each of them, have, or claim to have, an interest in said land described in paragraph IV of this complaint, but that the nature, character or extent of such interest is unknown to the plaintiff.

XIX.

The plaintiff further alleges that the Congress of the United States by the Act entitled "Making Appropriations for the Fiscal Year Ending June 30, 1938, for Civil Functions administered by the War Department, and for Other Purposes," approved July 19, 1937 (Public No. 208—75th Congress, H. R. 7493) has appropriated funds for the

acquisition of the right to use and occupancy of the land hereinbefore described and sought herein to be taken, and the appurtenances thereto, and that there are sufficient funds now available for the payment of just and reasonable compensation therefor in whatever sum this Court may adjudge constitutes such just and reasonable compensation, and sufficient funds are available for the development and future control of said Ruck-a-Chucky Dam and Reservoir Project. [13]

XX.

That the public use, interest, convenience and necessity require that the said quantum of estate in said land hereinbefore described, together with the appurtenances thereto, be appropriated to the extent and for the purposes as aforesaid, acquired and taken for the purposes hereinbefore set forth, and as set forth in said Document No. 50, and the recommendation of the Chief of Engineers therein contained, that this Honorable Court inquire into, determine and adjudge any and all ownerships, interest, titles, estates, demands or liens of said defendants, and each of them, in, to, or upon said land, or any part thereof.

XXI.

That none of the property herein described has heretofore been appropriated for public use.

XXII.

That the defendant, Central Pacific Railway Company, a corporation, is a corporation duly or-

ganized and existing under and by virtue of the laws of the State of Utah, and duly authorized to own property and transact business in the State of California.

That said defendant, Central Pacific Railway Company, a corporation, claims some right, title and interest, other than the fee, in and to the land described in paragraph IV of this complaint, the particular nature whereof is to plaintiff unknown, except that certain records in the office of the County Recorder in and for the County of Placer, State of California, disclose that under date of October 10, 1904, said defendant corporation filed an action against one Grace B. Maither, Administratrix of the Estate of A. F. Maither, deceased, to cancel an alleged contract of sale between it and the said A. F. Maither, which contract bears date of November 18, 1901; that in said action a judgment was made [14] and entered in favor of said defendant corporation on November 9, 1904; that other than as aforesaid the plaintiff has no information as to the claim of said defendant, Central Pacific Railway Company, a corporation, and leaves it to said last named corporation to appear herein and assert its claim, if any it has.

XXIII.

That said defendant, Southern Pacific Land Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California.

That said defendant, Southern Pacific Land Company, a corporation, claims some right, title or in-

terest in and to said land described in paragraph IV of this complaint, other than the fee therein and thereto, and that such claim is based upon some assignment of interest from said defendant, Central Pacific Railway Company, a corporation, the nature of which is to plaintiff unknown, and plaintiff leaves it to said defendant corporation to appear herein and assert its claim, if any it has.

XXIV.

That said defendant, Grace B. Maither, individually and said defendant Grace B. Maither, as Administratrix of the Estate of A. F. Maither, deceased, may claim some right, title or interest in and to the land described in paragraph IV of this complaint other than the fee therein and thereto, the nature and extent of which claim is to plaintiff unknown and plaintiff leaves it to said defendant to in her individual capacity and as Administratrix as aforesaid, appear and assert such claim as she may have, if any.

Plaintiff alleges that said defendant has no valid claim in and to the said real property, and if she ever did have such claim the same is now null and void. [15]

XXV.

That said defendants, Margaret V. McDonald, Mary E. Fowler, and James G. Maither, appear by the records in the office of the County Recorder in and for said County of Placer, to have acquired by deed from one Martha Huffman dated December 21, 1912, and recorded September 25, 1913 in Book

144 of Deeds, at page 394, said Placer County Records, title to what is designated in said deed of conveyance as "Mile Hill Water Right" in and to said Section 23 referred to in paragraph IV of this complaint.

That plaintiff is not informed of the nature and the extent of such "Mile High Water Right" in so far as the same may affect the land described in paragraph IV of this complaint and therefore leaves it to said defendants to appear herein and assert such rights, claim or claims, if any, they have.

XXVI.

That said defendant, The El Dorado and Placer Counties Gold Mining & Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and until March 1, 1919 was duly authorized to transact business and acquire interest in land in the State of California; that on said March 1, 1919, the said corporation forfeited its California franchise and has not to the date of the commencement of this action had its franchise restored.

That under date of September 4, 1907, said corporation executed a deed of trust to said defendant D. B. Richards, as trustee, in which deed of Trust the said defendants Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Der Mehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock and W. D. Stevens, are named as beneficiaries, which deed of trust was recorded on September 7, 1917, in Book 167 of Deeds, at page 239, in [16] the office of the

County Recorder in and for the said County of Placer, which deed of trust, among other property, covers the "Middle Ford Placer Mining Claim" in the SE $\frac{1}{4}$ of said section 23, and also all the right, title and interest of said corporation in and to the "Georgia Lee Placer Mining Claim;" that said property covered by said deed of trust was sold under the terms of the said deed of trust because of a default, and a trustee's deed was issued to said defendant B. J. Corrigan; that the said trustee's deed did not include the "Georgia Lee Placer Mining Claim;" that the said "Georgia Lee Placer Mining Claim" was purported to have been located on March 31, 1913, by Andrew Schlappi, Andrew Hoffman, said defendant Georgia Maither and said defendant Ada L. Threlkeld; that the said Andrew Schlappi and the said Andrew Hoffman thereafter conveyed their purported interests as aforesaid to said defendants Georgia Maither, and Ada L. Threlkeld.

That plaintiff is not informed as to the nature and extent of the claim or claims of said defendants, The El Dorado and Placer Counties Gold Mining & Power Company, a corporation, D. B. Richards, as trustee, Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Mehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock, W. D. Stevens, B. J. Corrigan, Georgia Maither and Ada L. Threlkeld, and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other

than the fee therein and thereto which is vested in the United States of America.

XXVII.

That the said defendant American River Gold Mining Company, a corporation, is a corporation organized and existing [17] under and by virtue of the laws of the State of California.

That the said defendants, American River Gold Mining Company, a corporation, F. J. O'Connor, Stella O'Connor, R. B. Somerby, W. H. Morrison and W. F. Fisher, claim some right, title or interest in and to the real property described in paragraph IV hereof other than the fee therein and thereto which is vested in the United States of America; that plaintiff is unable to state what, if any, rights said defendants last above named may have in and to said real property and therefore leaves it to said defendants last named to appear herein and assert any claim they or each of them may have other than the fee vested as aforesaid in the United States of America.

XXVII½.

That from information had from the Division of Investigation of the United States Department of Interior, General Land Office, Washington, D. C., it appears and plaintiff so alleges, that the defendants R. J. Miedel, F. J. O'Connor and Stella O'Connor, are the only owners of any valid mineral rights in and to the said real property described in paragraph IV hereof.

XXVIII.

That the said defendant Fred I. Green, also known as F. I. Green, claims some right, title or interest in and to the real property described in paragraph IV hereof other than [18] the fee therein and thereto which is vested in the United States of America, and under date of June 13, 1938, said defendant Fred I. Green, also known as F. I. Green, filed an action to quiet title to certain alleged mining rights and mining claims covering among other property mining claims in and to said real property described in paragraph IV hereof against said defendants, F. M. O'Connor, Stella O'Connor, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher and American River Gold Mining Company, a corporation, and said action is presently pending in the Superior Court of the State of California in and for said County of Placer.

That plaintiff is unable to state what, if any, rights said defendants Fred I. Green, also known as F. I. Green, may have in and to any mining claims in and to said real property described in paragraph IV hereof and leaves it to said defendant to appear herein and assert any claim he may have therein or thereto other than in the fee which is vested in the United States of America.

XXIX.

That the said defendant, R. J. Miedel, claims some right or interest in and to the land described in paragraph IV hereof, other than the fee therein

and thereto by virtue of ownership of what purports to be known as the "Spanish Bar Placer Mining Claim," which claim purports to have been located by said defendants, F. M. O'Connor, Stella O'Connor, and one F. A. Crone and one D. A. Crone, under date of August 28, 1934, recorded August 29, 1934, in Book "Y" of Mining Locations, page 345, El Dorado County Records, in the office of the County Recorder in and for said County of El Dorado, and said defendant R. J. Miedel claims said "Spanish Bar Placer Mining Claim" by virtue of assignment and quitclaim deeds from said F. A. Crone and D. A. Crone. [19]

XXX.

That said defendants, Fred I. Green, also known as F. I. Green, and M. L. Cummings, claim to have relocated said "Spanish Bar Placer Mining Claim" under the name of the "Spanish Bar Association Placer Mining Claim" by notice dated September 26, 1937, in which it is claimed that the original location of "Spanish Bar Association Placer Mining Claim" as located August 28, 1934, has been abandoned and forfeited, and said relocation is recorded in the office of the County Recorder in and for the County of El Dorado, California, September 29, 1937, in Book "Z" of Mining Locations at page 320;

That plaintiff is unable to determine the extent and nature of said claim of said defendants Fred I. Green and M. L. Cummings and leaves it to said defendants to appear herein and assert any claim they or either of them may have in and to the real

property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXI.

That the said defendants, H. A. McKinstry, J. A. Ware, F. J. Foster and J. G. Maither, have filed the following mining location, to-wit, "Middle Fork Placer Mining Claim," dated February 3, 1908, recorded March 20, 1908 in Book "N," page 406, and Amended Location in Book "S," page 336, in the [20] Office of the County Recorder in and for the said County of El Dorado.

That plaintiff is unable to determine the extent and nature of said claim of said defendants last above named in and to the real property described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXII.

That the said defendant, Susie M. Maither, filed mining claim known as "Big Bend Placer Mining Claim," dated May 21, 1917, recorded in the office of the County Recorder in and for said County of El Dorado on May 23, 1917, in Book "S," page 376.

That plaintiff is not able to determine what interest, if any, said defendant has in and to the real

property described in paragraph IV hereof and leaves it to said defendant to appear herein and assert whatever claim she may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXIII.

That on March 12, 1932, the said defendants, George Z. Johnson, John W. Killinger and C. W. Fletcher made location of what is known as "Good Find Placer Mining Claim" and caused notice of such mining claim to be recorded in the office of the County Recorder in and for said County of El Dorado on March 17, 1932, in Book "X," page 323.

That plaintiff is unable to determine the nature and extent of the interest of said defendants last named in and [21] to the real property described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXIV.

That on July 1, 1935, the said defendants, Jack Ward and Irene Gannett, filed a mining location known as "Oregon Bar Placer Mining Claim," and recorded the same in the Office of the County Recorder of El Dorado County on July 31, 1935, in Book "Z" at page 11;

That plaintiff is unable to determine the nature and extent of the claims of said defendants and each of them in and to the land described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXV.

That none of the defendants named or referred to in the above entitled cause, other than said defendants F. M. O'Connor, Stella O'Connor and R. J. Miedel, has any valid right, title, interest, estate or valid claim in and to the land described in paragraph IV of this complaint. [22]

Wherefore, Plaintiff prays judgment:

(1) That under process of this Court, the defendants hereinbefore named, and all unknown owners of any interests or claims may have notice of said proceeding in the manner provided by law, and that they may be required to set forth the nature and extent of their several ownerships, claims, interests, titles, estates, rights or liens, if any, in, to, or upon said premises, or in, to, or upon any part thereof, and that their asserted ownerships, claims, interests, titles, estates, rights or liens, if any, may be adjudicated and forever determined and concluded thereby;

(2) That it may be adjudged by this Court that the public use to which the quantum of estate herein

sought to be condemned to the extent and for the purposes as proposed to be devoted by the plaintiff, is a public use authorized by law, and that such public use requires the condemnation of the said quantum of estate in and to the premises hereinbefore described and the whole thereof, to the extent and for the purposes in this complaint stated, and that the taking is necessary to such use;

(3) That judgment be rendered in favor of the plaintiff against the interest of each said defendant in and to the land described in paragraph IV hereof, together with the appurtenances thereto, condemning a right of uninterrupted use and occupancy of the land hereinbefore described for a period of two years from and after the time of the granting and entry of an Order of this Court granting to the United States of America immediate possession of said land for the purposes of, and with the right, power and privilege of, during said period of two years, taking and removing concrete aggregates, such as sand and gravel and other materials commonly known as concrete aggregates, therefrom [23] and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir Project, and with the right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of removing said concrete aggre-

gates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in manner as follows:

The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard $\frac{1}{4}$ " screen and a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed and operated by the owner, and, except as specifically indicated below, without cost to the United States of America.

(A) All material which will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard $\frac{1}{4}$ " screen;

(b) All material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load. [24]

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery devices in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install and operate gold recovery

devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen;

(b) A vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, but passes a standard 1" screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 per cent, such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid. [25]

(4) That the Court adjudge and decree that whatever right or interest each or all of said defendants may have in and to said land be held in abeyance, and particularly each their right to the mining of said land, be held in abeyance for and during the said period of said use and occupancy of said land sought to be acquired herein shall continue, and that the Court likewise adjudge the value of any detriment suffered or to be sustained by said defendants, and each of them, by reason

of such use and occupancy by plaintiff, and such holding in abeyance of any such rights that each said defendant, or any of them, may have to mine said land as aforesaid, and that the award therefor when made and paid by plaintiff herein be adjudged and decreed to be the full and just compensation for the taking of said use and occupancy, as aforesaid;

(5) For any and all other orders, judgments or decrees that may be legal and appropriate, and especially that all persons having or claiming said land or any interest therein may be permitted and required to file appropriate pleadings to make known their claims and to pursue the fund so to be paid into Court and have all such matters adjudicated in legal and timely source between the defendants, but without further concern to the United States except to pay into Court the ascertained value of said use and occupancy in and to said land, together with the appurtenances thereto, together with said holding in abeyance of any right of said defendants to mine said land as awarded, and be thereupon vested with said right of use and occupancy for uses and purposes as set forth in paragraph V of this complaint in and to said land, together with the appurtenances thereto; [26]

(6) That such proceedings may be had herein as are required by law, that upon compliance with the requirements of the judgment entered herein and the provisions of Title VII of Part III of the Code of Civil Procedure of the State of California in that behalf contained, a final order of condemnation of said premises be made and entered herein;

(7) For such other and further relief as may be meet and proper in the premises.

FRANK J. HENNESSY,
United States Attorney

G. B. HJELM,
Assistant United States
Attorney.
Attorneys for Plaintiff. [27]

VERIFICATION

United States of America,
State and Northern District of California,
County of Sacramento—ss.

G. B. Hjelm, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California, and one of the attorneys for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason why this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign;

That the sources of the affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States and from the Secretary of War of the United States.

G. B. HJELM

Subscribed and sworn to before me this 10 day of October, 1939.

[Seal] F. M. LAMPERT
Deputy Clerk, U. S. District Court, Northern District of California

[Endorsed]: Filed Oct. 10, 1939. [29]

[Title of District Court and Cause.]

Order Granting Possession of Property in Which a Right of Use and Occupancy Is Sought to Be Condemned, and Authorizing Plaintiff to Proceed Thereon With the Public Work Authorized by Congress. [31]

Upon reading and filing the complaint in the above action, together with affidavit of L. B. Chambers, Colonel, Corps of Engineers, United States Army, and it further appearing that application has been made by plaintiff to be let into immediate possession of the lands described in the complaint herein, and hereinafter described, and to take and make use of the quantum of estate sought to be condemned as alleged in said complaint, and to proceed thereon with the public work authorized by Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint; and it further appearing that certain and adequate provision has been made for payment of just compensation to the parties entitled thereto by previous appropriation of Congress of the United States for that purpose;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff be and it is hereby entitled to and shall be given immediate possession and use of the land described in the complaint herein, and hereinafter described, and plaintiff is hereby authorized to take possession of said land and to proceed with the public work thereon authorized by

Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint. The United States Marshal is hereby authorized to place plaintiff in possession of said land.

Following is a particular description of the land affected by this Order.

All that certain real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as follows: [32]

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N., R. 9 E., M.D.B. & M., said point bearing S. $89^{\circ} 55'$ W. and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N., R. 9 E., M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or less,

to the northeast corner of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the E $\frac{1}{2}$ of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 23, S. 2° 52' E., 2,677.0 feet, more or less, to the point of beginning, and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

The Court reserves the right hereafter to make such other and further Order herein as shall be just in the premises.

Done in open court this 10th day of October, 1939.

MARTIN I. WELSH,
Judge, U. S. District Court.

[Endorsed]: Filed Oct. 10, 1939. [33]

[Title of District Court and Cause.]

Answer of Defendants F. M. O'Connor, Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward and Irene Brinton, Sued Herein as Irene Gannett.

Comes now the defendants, F. M. O'Connor, Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward, and Irene Brinton, sued herein as Irene Gannett, and answering the complaint on file herein, admit, deny and allege:

I.

Allege that at all times herein mentioned defendants F. M. O'Connor and Stella O'Connor have been and now are husband and wife;

II.

Allege that the true name of the defendant sued and served herein as Irene Gannett, is Irene Brinton; allege that after defendant Irene Brinton acquired an interest in the real property described in the complaint she intermarried with John Brinton and that she is the person mentioned in the complaint as Irene Gannett; allege that prior to the commencement of this action defendant Irene Brinton and defendant Jack Ward sold, assigned, transferred and set over to defendants F. M. O'Connor and Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison and W. F. Fisher, the right, title and interest, if any, which the said defendants Jack Ward and Irene Brinton then had and for that reason disclaim any interest in and to the real property, or to any compensation to be paid for the use thereof; [34]

III.

Answering paragraph II, allege that they are informed and believe and therefore state that subsequent to the 30th day of August, 1936, plaintiff changed and altered its plans for the construction of a debris dam on the Middle Fork of the American River and that the public works now to be constructed and for which plaintiff now seeks to

use the real property described in the complaint is different from and no longer the same as the project originally authorized by the Act of Congress approved August 30, 1935, and referred to in said paragraph II;

IV.

Answering paragraph III, allege that they are informed and believe and therefore state that the dam which plaintiff proposes to construct is not the dam originally contemplated or authorized by Act of Congress, but is another and different dam therefrom;

Further answering said paragraph, allege that they are informed and believe and therefore state that the dam originally contemplated as set forth in paragraph III, and the dam which plaintiff now proposes to construct, will not prevent, or aid in the prevention of, the flow of any debris resulting from hydraulic mining, or natural erosion, or otherwise, which may accumulate from the watershed of the Middle Fork of the American River at or above the place on said river where it was originally contemplated and planned by plaintiff to construct a dam, or at the place where it is now contemplated by plaintiff to construct a dam, and that said dam, if built, will not prevent the flow of said debris, as aforesaid, down the course of said river into the American River, or into the Sacramento River, or prevent such or any debris or accumulations from such or any erosion from obstructing, or impeding, or interfering with navigation in the navigable portions of any river in the

State of California, or in the United States of America;

V.

Answering paragraph IV, deny that the construction of the dam set forth in the complaint is for the control of debris in the Sacramento River or any of its tributaries in the State of California, or authorized by the River and Harbor Act of August 30, [35] 1935; allege that the selection of said, or any, site, and the construction of said, or any, dam, is proposed by the Secretary of War of the United States of America, and by plaintiff, for the purpose of unlawful gain not provided by statute, in this, that plaintiff proposes to lease said dam to a miner, or miners above said dam for the purpose of storing tailings from mining operations and that said dam is not designed for and will not be used for a public purpose, but will be used solely and exclusively for private gain; admit that plaintiff proposes to use sand and gravel and other concrete aggregates now upon a portion of the real property described in the complaint; deny that said use is in any manner, or at all, for public purpose;

Further answering said paragraph IV, and referring particularly to the provisions therein set forth for the recovery of the gold content of such material as plaintiff proposes to take, these defendants allege that the specifications set forth in said paragraph are inadequate and are prejudicial to the rights of these defendants if carried into effect and that provision as set forth in said complaint should not be made for the following reasons:

a. That no rate of extraction of material is specified therein and that 2100 gallons of water per minute may, or may not, be adequate for the purpose of extracting gold from the material taken from said real property, dependent on the speed at which plaintiff proposes to remove the same, which speed is not specified in said provisions;

b. That 20 horsepower of connected load of electric energy may, or may not, be adequate for gold recovery devices, dependent upon the speed at which plaintiff proposes to remove material from said real property and that no speed at which said material will be extracted is specified in said provisions;

c. That the removal of machinery, plant, buildings, etc., by plaintiff from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America may, or may not, be within a period of two years from taking possession [36] of said real property, in that said completed dam may never be accepted by plaintiff and said machinery may never be removed;

d. That it is impossible to determine the manner or rate at which these defendants should operate their gold recovery devices in that no rate of removal of material from the aforesaid real property is specified or determined;

e. That a vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen may, or may not, be adequate for the recovery of gold from the materials removed, dependent upon

the speed at which plaintiff removes the same and that no rate of removal is specified in the complaint;

f. That a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, and passes a standard 1" screen, may, or may not, be adequate for the removal of gold from the material removed from the real property by plaintiff, dependent upon the rate at which plaintiff removes the same and that no rate of removal is specified in the complaint; that it may, or may not, be possible to return all material after the recovery of gold and other precious minerals by force of gravity at the same rate and of the same consistency as delivered to the gold recovery devices with a loss of not more than 5 per cent, dependent upon the rate at which plaintiff removes said material from the real property described in the complaint and that no rate of removal of said material is specified in the complaint.

g. That no devices or appliances for the recovery of gold are determined in the specifications set forth in said paragraph nor in any provision therein made for the amount of gold, if any, to be recovered;

Further answering said paragraph, these defendants allege that in the event these defendants, or any of them, are [37] unable to comply with the specifications set forth in said complaint, an exact determination of the loss to these defendants, or any of them, by reason of the recovery of the gold content from the material taken, cannot be ascer-

tained, and in the event plaintiff elects to carry out the requirements set forth in said paragraph, no means or appliances are therein specified and it will be impossible to determine whether or not the devices used by plaintiff are adequate to remove, or are successful in removing, all, or any substantial part of the gold content of the material removed by plaintiff from the said real property;

Further answering said paragraph, these defendants allege that no provision is made in said specifications for the part or portion of said real property from which said material will be removed; that the gold content of the sand and gravel on said real property varies throughout said real property; allege that in all portions of said sand and gravel deposit on said real property the gold content is at least $1/66$ of a troy ounce per cubic yard of sand and gravel and in places exceeds $1/3$ of a troy ounce of gold per cubic yard of sand and gravel; that unless plaintiff specifies the part or portion from said gravel bar from which plaintiff proposes to remove said sand and gravel or other concrete aggregates, it will be impossible to determine the amount of gold taken by plaintiff from said real property and the consequent loss, or damage, if any, to these defendants, and each of them;

Further answering said paragraph, these defendants allege that the real property from which plaintiff seeks to take said sand and gravel and other concrete aggregates is all that certain real property situate lying and being in the Counties of Placer and El Dorado, State of California, and

more particularly described as the East half ($E\frac{1}{2}$) of the West half ($W\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section Twenty-three (23), Township Thirteen (13) North, Range Nine (9) East, Mount Diablo Base and Meridian; allege that said real property is not delineated and bounded as set forth in the complaint but is delineated and [38] bounded as follows, to-wit:

Beginning at a point marking the Southeast corner of the Southeast quarter of the Southwest quarter of the Southeast quarter of Section 23, Township 13 North, Range 9 East, M.D.B. & M., said point bearing South $89^{\circ} 59' 30''$ West and distant 1346.16 feet from the corner common to Sections 23, 24, 25 and 26, Township 13 North, Range 9 East, M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, South $89^{\circ} 59' 30''$ West 673.08 feet to the Southwest corner of the Southeast quarter of the Southwest quarter of the Southeast quarter of said Section 23; thence along the North and South line on the West side of the East half of the West half of the Southeast quarter of said Section 23, North $0^{\circ} 37'$ West 2596.61 feet to the Northwest corner of the Northeast quarter of the Northwest quarter of the Southeast quarter of said Section 23; thence along the East and West one-half Section line of said Section 23 South $87^{\circ} 25'$ West 660.74 feet to the Northeast corner of the Northeast quarter of the Northwest quarter of the Southeast quarter of said Section 23; thence along the North and South line on the East side of the East

half of the West half of the Southeast quarter of said Section 23; South $0^{\circ} 54'$ East 2626.52 feet to the point of beginning, all of the above bearings being fixed by reference to true North Meridian;

Alleges that the map or plat attached to the complaint for the foregoing reasons does not truly show the land from which plaintiff seeks to remove said sand and gravel and other concrete aggregates;

VI.

Answering paragraph V alleges that plaintiff does not propose to take such sand and gravel and other material commonly known as concrete aggregates from the aforesaid lands for the purpose of carrying out the construction of the Ruck-a-Chucky Dam and Reservoir project as originally contemplated and allege that the sand and gravel and other materials commonly known as concrete aggregates sought to be taken therefrom are not expedient or necessary or proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir project; allege that the Ruck-a-Chucky Dam and Reservoir project as originally contemplated has been abandoned and that plaintiff seeks by this action to take sand and gravel and other materials commonly known as concrete aggregates in an amount now unknown for a project now undetermined and other than that originally contemplated when this action was filed; allege that for the reasons set forth hereinabove, the provisions for the recovery of said gold are inadequate for the protection of the rights of these defendants

and will not compensate these defendants in any [39] manner, or at all, for the damage which will be sustained by these defendants if plaintiff be permitted to remove sand and gravel and other materials commonly known as concrete aggregates as therein specified;

VII.

Answering paragraph VI, these defendants are informed and believe, and therefore state, that adequate funds are not available for paying any awards that may be granted herein to any of the above named defendants or to anyone having an interest in said land from any source, or at all; allege that a portion of the gravel and sand on said real property contains gold in quantities in excess of $\frac{1}{3}$ of a troy ounce per cubic yard of sand and gravel and that the value of the gold per cubic yard in such portions exceeds the sum of \$12 per cubic yard; that these defendants are informed and believe, and therefore state, that plaintiff proposes to take the portion of the gravel on said real property containing gold content of that value and of that quality and proposes to take at least 70,000 cubic yards thereof and that the loss to these defendants by reason of the taking thereof, exclusive of the value of the sand and gravel and other materials commonly called concrete aggregates, from that portion will damage these defendants in a sum exceeding \$840,000; that until plaintiff specifies the part or portion of said bar from which plaintiff will take said gravel and excludes the part or portion containing gold of a quality per cubic yard

as above set forth, these defendants will be damaged in that sum or greater;

That defendants propose to mine said real property and to extract and recover the gold therefrom; that the net profit which defendants will derive during the period of two years which plaintiff has possession of said real property will exceed the sum of \$500,000 per year; that if defendants are compelled to defer said profits for a period of two years defendants will be damaged to the amount of the interest at seven per cent per annum on said profits for a period of two years [40] and that said damage to these defendants will exceed the sum of \$70,000;

Further answering said paragraph, allege that at all times herein mentioned the reasonable value of the gravel sought to be taken by plaintiff from said real property has been and is the sum of \$1.00 per cubic yard thereof and that the reasonable value of the sand sought to be taken by plaintiff from said real property has been and is the sum of \$2.00 per cubic yard; that plaintiff does not now know and these defendants do not now know the exact amount or the approximate amount of sand or gravel sought to be taken by plaintiff from the aforesaid real property and until said exact amount becomes known, these defendants are unable to state the loss which they will sustain if plaintiff takes sand or gravel from said real property;

VIII.

Answering paragraph VII, allege that they have no information or belief with respect to the allegations contained in said paragraph and for that reason and placing their answer upon that ground deny each and every, all and singular, generally and specifically the allegations therein contained;

IX.

Answering paragraph VIII, admit that plaintiff, through the Secretary of War of the United States of America, has endeavored to acquire a quantum of said estate as set forth in paragraph IV of the complaint and described in paragraph V of this answer; admit that plaintiff has been unable to acquire the same at the price or upon conditions and terms offered by it; allege that the price and the terms and the conditions, if any, which plaintiff, through the Secretary of War of the United States of America, has determined to offer are unreasonable and unfair to these defendants; allege that these defendants at all times herein mentioned have been and now are willing to sell to plaintiff any quantum of estate in the land described in paragraph V of this answer for any purpose, or at all, provided these [41] defendants are justly compensated and if the terms and conditions for the taking thereof by plaintiff are reasonable and just both to plaintiff and to these defendants;

X.

Answering paragraph IX, admit that plaintiff has been in possession pursuant to the statute there-

in set forth continuously since the 17th day of October, 1939, and have thereby prevented these defendants, or any of them, from taking any part or portion of the gold content from the sand and gravel on said real property and have damaged these defendants by reason thereof to the extent of \$200 for each and every day that plaintiff has been in possession thereof and that these defendants will continue to be damaged at the rate of \$200 for each and every day that plaintiff continues in possession thereof;

XI.

Answering paragraph X, allege that they have no information or belief with respect to the allegations contained in said paragraph and for that reason and placing their answer upon that ground deny each and every, all and singular, generally and specifically, the allegations contained in said paragraph;

XII.

Answering paragraph XI, deny that the use sought to be made by plaintiff of the sand and gravel and other materials commonly known as concrete aggregates planned to be taken from the property described in paragraph V of this answer, or the other use sought to be made of said property, is a public use; allege that said use is for private gain; deny that the improvement sought to be made is now either planned or located in a manner most compatible with the greatest public good or the least private injury, or is planned or located at all;

XIII.

Answering paragraph XII, deny each and every, all and singular, generally and specifically the allegations therein contained;

XIV.

Answering paragraph XIII, deny each and every, all and [42] singular, generally and specifically the allegations therein contained;

XV.

Answering paragraph XV, allege that on the 28th day of August, 1940, plaintiff executed and issued a patent upon a certain mineral entry numbered 031856 in the United States Land Office at Sacramento, California; that said patent was issued to defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel; that said patent was delivered to defendants F. M. O'Connor, Stella M. O'Connor, his wife, and R. J. Miedel on the 6th day of September, 1940; that said land patent named as patentee Fred M. O'Connor, Stella M. O'Connor, and Russel J. Miedel; that the said Fred M. O'Connor is the same person as defendant F. M. O'Connor; that Stella M. O'Connor therein named is the same person as defendant Stella O'Connor; that the Russel J. Miedel therein named is the same person as defendant R. J. Miedel; allege that ever since said 6th day of September, 1940, defendants F. M. O'Connor, Stella O'Connor and R. J. Miedel have been and are the owners of said patent and entitled to the possession

thereof free and clear of any claims of plaintiff United States of America, save and excepting such claims as plaintiff United States of America may have acquired by virtue of the entry into possession as set forth in paragraph X herein;

XVI.

Answering paragraph XVI, allege that none of the defendants named in the complaint have any right, title or interest in or to said real property save and excepting defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel; allege that defendants F. M. O'Connor and Stella O'Connor, his wife, are owners of a one-half interest in and to said real property and that defendant R. J. Miedel is the owner of a one-half interest in and to said real property, subject to the rights of the said R. J. Miedel derived by virtue of an agreement in writing; that said agreement in writing was executed on the 4th day of May, 1939, by defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel and by each delivered to the other; that a copy of said agreement is attached to this answer and marked Exhibit "A"; [43] that the said agreement is hereby incorporated and made a part hereof as if the same were herein set forth in full; allege that each of the previous leases and modifications and suspensions thereof were executed on the dates set forth therein by the parties whose names are subscribed thereto and on said date by each delivered to the other; that copies of each of said agreements are hereto attached and marked

respectively Exhibit "B," "C," and "D," being so lettered in accordance with their respective priorities as to time, and each of said agreements is hereby incorporated and made a part hereof as if the same were herein set forth in full; allege that all of the parties executing said documents; or any of them, save and excepting defendants F. M. O'Connor and Stella O'Connor, his wife, did, subsequent to the execution and delivery of said instruments, assign, sell, transfer and set over their right, title and interest in and to said real property to defendant R. J. Miedel, and that defendant R. J. Miedel ever since has been and is now the owner of the rights therein given to said assigning defendants;

XVII.

Answering paragraph XVII, deny that any person or persons other than defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel have any right, title, or interest in or to said real property;

XVIII.

Answering paragraph XIX, allege that they are informed and believe and therefore state that the Congress of the United States has not appropriated sufficient funds for the acquisition of the right to use and occupancy of the land described in the complaint or the land described in this answer or sought to be taken, and deny that there are sufficient funds now available for the payment of just or reasonable compensation therefor;

XIX.

Answering paragraph XX, deny that the public use or interest or convenience or necessity require that the quantum of the estate in the land described in the complaint or the land described in this answer or the appurtenances thereto, or any [44] quantum, or any estate in any lands, be appropriated to the extent or for the purposes, or acquired or taken for the purposes set forth in the complaint, or for any purpose, or for the purposes set forth in Document No. 50, or in the recommendation of the Chief of Engineers therein contained;

XX.

Answering paragraphs XII, XXIII, XXIV, XXV, XXVI, XXVII, XXVII½, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV, and XXXV of the complaint, these defendants repeat the allegations, admissions and denials contained in paragraphs XV and XVI of this answer and hereby incorporate the same and make the same a part hereof as if the same were herein set forth in full;

Wherefore, these defendants pray judgment in their favor, as their rights may be found to appear, for the recovery of damages in an amount which the court may find these defendants, or the persons entitled thereto may have justly sustained by reason of the determination of use of said real property by plaintiff as set forth herein and that plaintiff be denied any right to take any part or portion of the real property described in the com-

plaint, or described in this answer, and for such other and further relief as may be proper in the premises, and for their costs of suit.

R. J. MIEDEL.

State of California,

County of Alameda—ss.

R. J. Miedel, being first duly sworn, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the facts therein stated are true of his own knowledge, except as to the facts therein stated on information and belief, and as to those facts he believes it to be true.

R. J. MIEDEL.

Subscribed and sworn to before me this 12th day of March, 1941.

[Seal] R. B. SOMERBY,
Notary Public in and for the County of Alameda,
State of California.

Subscribed and sworn to before me this 14th day of March, 1941.

[Seal] CHAS. O. BRUCE,
Notary Public in and for the County of Alameda,
State of California.

FRANCIS T. CORNISH,
Attorney for These Answer-
ing Defendants. [45]

[Endorsed]: Filed March 25, 1941. [46]

EXHIBIT "A"

AMENDED LEASE

This Agreement, made and entered into this 4th day of May, 1939, by and between F. M. O'Connor and Stella M. O'Connor, his wife, lessors, and R. J. Miedel, lessee, witnesseth;

That Whereas, on the 31st day of October, 1934, F. M. O'Connor, and Stella M. O'Connor, his wife, F. A. Crone and D. A. Crone did lease to R. J. Miedel and associates for a period of five years from said date, or until the property therein described was fully mined, certain real property then belonging to the lessors in said lease, and

Whereas, since entering into that lease, lessee herein has acquired the right, title and interest of D. A. Crone and F. A. Crone, and is now the owner of an undivided one-half interest in and to the real property hereinafter described, and

Whereas, it has been impractical to mine the said real property for a period in excess of four years because of pending litigation and clouds on the title thereto and a pending application for a United States Land Patent, and lessors have suspended the working requirements of said lease, and lessee has advanced the funds so far necessary to conduct and defend said litigation, and to obtain said United States Land Patent, and

Whereas, the real property herein referred to is all that certain piece or parcel of real property situate, lying and being in the Counties of Placer

and Eldorado, State of California, and more particularly described as follows, to-wit:

The East half ($E\frac{1}{2}$) of the west half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section 23, Township 13 North, Range 9 East, M. D. B. & M.

And Whereas, the United States of America has declared through its War Department Engineers stationed at Sacramento that it intends to condemn the right to remove gravel from said real property unless satisfactory negotiations can be entered into between lessee and the United States of America, and said condemnation will preclude the mining of a portion or all of the aforesaid real property during the time said gravel is being removed and for a period not to exceed three years,

Whereas, the parties, in view of the aforesaid circumstances, desire to modify and extend said lease, and to lease to lessee herein alone;

Now, Therefore, said lease of October 31, 1934, and the subsequent modifications and suspensions thereof, are hereby modified, and it is hereby agreed as follows:

Lessors do by these presents lease, demise and let to lessee the sole and exclusive right to mine upon and in, and to take minerals from, and to sell and negotiate for the sale of minerals in, or upon, the aforesaid real property, severed or unsevered therefrom.

The duration of this lease shall be for a period of five years from date hereof, and for as long

thereafter as it shall be commercially practicable to mine the said real property.

Lessee agrees to mine the said real property. Said mining may commence at once, and shall in any event commence not later than ninety days following the issuance to the parties of a United States Land Patent and shall continue thereafter for the life of this lease, continuously. The process of installing machinery or equipment or repairing machinery or equipment shall be considered as mining. Any failure to mine said property for a period of ninety consecutive days shall be construed a violation of the terms of this lease, unless lessee shall be prevented therefrom by strikes, act of God, or for any other reason not within the control of lessee, or unless the water level on said property interferes with the place or manner lessee is at that time engaged in mining said property, or during such seasons as weather makes use of roads to said property in connection with the mining thereof dangerous or impractical.

It is further agreed that while the United States of America or its licensee or assignee shall be in possession of the aforesaid real property or any portion thereof, or negotiating [48] therefor, or in the process of condemning any rights therein, lessee shall not be precluded from mining any other part or portion thereof, but said period shall suspend the working requirements herein imposed upon lessee and shall extend the term of this lease *pro tanto*.

Lessee agrees before the time at which mining

shall commence hereunder to place, or commence in good faith to place, upon said property the necessary machinery and equipment to develop and work said mining property in a manner meeting with the approval of such mining engineers or consultants as lessee may select.

There shall be no obligation on the part of lessee to recover any minerals other than gold, although nothing herein shall prevent lessee from recovering or selling other minerals or mineral substances. All gold recovered shall be shipped to the United States Mint and a duplicate mint receipt shall be furnished to lessors.

Lessee agrees to pay lessors $7\frac{1}{2}$ per cent of any amount received from the United States Mint for said gold recovered, said payments to be made not later than ten days following the receipt by lessee of payment by the United States Mint for any shipment of gold.

All other minerals taken by lessee from said property, or sold by lessee either on or off said property, or severed or unsevered therefrom, shall be sold for what lessee considers a fair and reasonable price and lessee shall pay to lessors 5 per cent of any amount received by lessee as the purchase price of said minerals, or the right to remove the same, including sand and gravel, said payments to be made within ten days after a receipt by lessee of the aforesaid purchase price.

Lessee agrees to notify lessors of any intended cleanups and lessors may be present thereat. Such

notice shall be given in any manner reasonably calculated to communicate that fact to lessors.

Lessee shall have the sole determination of what shall constitute a complete and thorough working of the property above [49] described and when the same shall have been exhausted for the purpose of mining and shall have complete control of the aforesaid property, and of the method of mining same, subject only to the right of lessors, by agent or in person, to inspect the aforesaid property and machinery at any reasonable time.

Regardless of the reason for the termination of this lease, lessee shall have such time as is reasonable, in no event less than 60 days, within which to remove any materials, equipment, machinery, buildings, or other property heretofore or hereafter placed on the said real property by lessee or predecessors of lessee.

In the event of a breach by lessee, a forfeiture of this lease shall not be declared until lessors shall first have delivered to lessee notice in writing advising lessee of the nature of said default and ninety days shall have elapsed under such notice, and lessee shall within that time have failed to remedy said default, except failure to continually mine, in which event lessee shall have said second period of ninety days within which to resume mining said property in good faith.

Lessee shall have the right to assign this lease or to enjoy the same either through himself or through his agents or sublessee. All of the terms, covenants and conditions, however, shall be binding

upon the respective parties, their heirs, administrators, sub-lessees and assigns.

In Witness Whereof the parties have hereunto set their hands the day and year in this instrument first above written.

F. M. O'CONNOR

STELLA M. O'CONNOR

Lessors

R. J. MIEDEL

Lessee [50]

State of California

County of Placer—ss.

On this fourth day of May in the year One Thousand Nine Hundred and thirty-nine before me, Marshall Z. Lowell, a Notary Public in and for the County of Placer, personally appeared F. M. O'Connor and Stella M. O'Connor, his wife, and R. J. Miedel know to me to be the persons whose names are subscribed to the within instrument, and they acknowledge that they executed the same.

Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the County of Placer, the day and year in this certificate first above written.

[Seal]

MARSHALL Z. LOWELL

Notary Public in and for the County of Placer,
State of California.

My commission Expires July 24, 1941. [51]

EXHIBIT "B"

This Agreement and Lease entered into this 31st day of October, 1934, by and between F. M. O'Connor and Stella M. O'Connor, his wife, D. A. Crone and F. A. Crone, Lessors, and R. J. Miedel and Associates, Lessees,

Witnesseth:

That the said Lessors, for and in consideration of the rents, royalties, covenants and agreements hereinafter set forth and by the said Lessees to be paid, kept and performed, have let and by these presents do let unto the said Lessees, and said Lessees do hire and take from Lessors, all of the following mine and mining property heretofore owned and described as the Spanish Bar and being situate in the Counties of Placer and Eldorado in the State of California, and being the East one-half of the northwest quarter, of the southeast quarter and the East half of the southwest quarter of the southeast quarter of Section 23, Township 13 north range nine East M. D. B. & M. as described in that certain location notice heretofore and on the 28th day of August, 1934, filed by Lessors in the United States land office at Sacramento, California, together with the appurtenances; to have to hold the same unto said Lessees for the term of five years from and after the date hereof, or until said mine (the same being placer mine), is fully worked and mined out, unless sooner forfeited as hereinafter specified.

And in consideration of said lease, said Lessees do covenant and agree with said Lessors as follows, to-wit:

To enter upon said mine and premises and work the same in a manner necessary to good and economical mining, said work to continue steadily and continuously from the date of this lease, and any failure to work said mining property for a space of ten consecutive days, Sundays and holidays excepted, (unless prevented therefrom by the Act of God, high or flood water, strikes, or for some reason not within the control of Lessees) shall be considered a violation of the terms of this lease—to, within a reasonable time hereafter, place upon said mining property the necessary machinery and equipment to properly develop and work said mining property.

From time to time, when in the judgment of Lessees it shall [52] be deemed proper so to do, clean-ups shall be made and when received shall be shipped by Lessees or transmitted to a United States Mint and/or smelter, and Lessees agree to furnish Lessors with a duplicate mint or smelter receipt when received and from the gross receipts or proceeds from the sale or disposal of said gold or minerals, said Lessees agree to pay over and deliver to the said F. M. O'Connor and Stella M. O'Connor, his wife, an undivided seven and one-half per cent ($7\frac{1}{2}$) thereof, and to F. A. Crone and D. A. Crone seven and one-half per cent ($7\frac{1}{2}$) making a total thereof of fifteen per cent (15%), save that black sand shall be cleaned up if

it will pay to do so and F. M. O'Connor and Stella M. O'Connor shall receive five per cent (5%) and D. A. Crone and F. A. Crone shall receive five per cent (5%) of the gross royalty of the proceeds of such sand that may be received from said sand, and any other by products (sand, gravel, etc.) well and truly to be paid as the free gold cleaned up is paid.

Said Lessees hereby agree to give notice of the time of any and all intended clean-ups to Lessors so that Lessors may be present thereat, if they so desire, said notice or notices to be given either verbally, by telephone or through the United States Mail.

Any personal property owned by Lessors, or either of them, now on said premises may be removed therefrom without expense to Lessees.

Said Lessees shall have the sole determination of what shall constitute a complete and thorough working of the placer mining property leased hereunder and when in the judgment of said Lessees the same shall have been exhausted for the purpose of extracting gold and minerals therefrom, it being understood and agreed that Lessees shall have immediate possession and complete control of said mining property for the purposes herein enumerated.

It is understood by all parties to this lease that a certain one hundred and fifty foot strip is reserved from the terms of this lease and assigned as the exclusive property of F. M. O'Connor. [53]

It is also agreed that Lessors shall at all times,

either by themselves or by a representative be entitled to a full and complete inspection of said mine and mining property and the operation of the same by said Lessees.

As and when, in the judgement of the Lessees, said mining property shall be exhausted for the purpose of extracting gold and mineral therefrom Lessees shall have the right to peaceably and quietly withdraw therefrom, and shall have the right to remove all tools, materials, mining accessories and machinery theretofore placed thereon and used by said Lessees in and upon said mining property, and this lease shall thereupon cease and terminate.

Lessees further agree in connection with said mining operations on said property to conform to all housing laws of the State of California and to see that all safety laws are rigidly enforced for the protection of employees engaged in said mining activities on said mining property.

In the event Lessees fail to perform the terms, covenants and conditions of the within agreement and lease, it shall be lawful for Lessors to re-enter and take possession of said premises and terminate this lease.

This agreement and all its terms, covenants and conditions shall be binding upon the parties hereto, their heirs, administrators and assigns, and time is of the essence hereof.

Witness the hands of the parties hereto in triplicate the day and year first above written.

MRS. STELLA M. O'CONNOR

F. M. O'CONNOR

D. A. CRONE

F. A. CRONE

R. J. MIEDEL

R. B. SOMERBY

W. H. MORRISON

W. F. FISHER

EXHIBIT "C"

MODIFICATION OF LEASE

This Agreement made and entered into this . . . day of 1935, by and between F. M. O'Connor and Stella M. O'Connor, his wife herein referred to as lessors, and R. J. Miedel and Associates, hereinafter referred to as lessees,

Witnesseth

That Whereas the parties herein together with D. A. Crone and F. A. Crone did, on the 31st day of October, 1934, enter into an agreement in writing by the terms of which the lessors and the said D. A. Crone and F. A. Crone did lease to lessees that certain piece or parcel of real property situate, lying and being in the counties of Placer and El Dorado, State of California, more particularly described as the east one-half ($E\frac{1}{2}$) of the west

one-half ($W\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) of Section twenty-three (23) Township thirteen (13) north, range nine (9) east M. D. B. & M., under the terms and provisions of said agreement, to which agreement reference is hereby made for further particulars.

And Whereas under and by virtue of the terms and provisions of said agreement of October 31, 1934, it was provided as follows: "It is understood by all parties to this lease that a certain one hundred and fifty foot strip is reserved from the terms of this lease and assigned as the exclusive property of F. M. O'Connor",

And Whereas the parties are desirous of eliminating said reservation and lessor desires that the said portion so reserved shall be mined and lessee desires to mine the same.

Now Therefore It Is Agreed by and between the parties hereto that said portion so reserved as the sole and exclusive property of said F. M. O'Connor under and by virtue of the terms of said agreement of October 31st, 1934 shall be no longer reserved from the said lease, and that said lease of October 31st, 1934, shall be and the same is hereby amended so as to eliminate said reservation from the terms and provisions thereof.

In consideration therefor, lessees agree to pay to F. M. O'Connor and Stella M. O'Connor, his wife, the same [55] royalties, for the use of said property as lessees agreed to pay to lessors, F. M. O'Connor and Stella M. O'Connor, his wife, under and by virtue of the terms and provisions of said lease

of October 31st, 1934, for the use of the property therein leased.

It is expressly understood and agreed that said agreement and lease of October 31st, 1934, is by these presents modified only to the extent necessary to eliminate the said reservation from the terms and provisions thereof.

It is further expressly understood and agreed that the requirements of said lease for the continued working of the property herein leased have been suspended pending the final determination of an action now pending in the Superior Court of the State of California, in and for the County of Placer, numbered therein 10041 and entitled, American River Gold Mining Company, a corporation, Plaintiff, v. F. M. O'Connor, Stella M. O'Connor, F. A. Crone, D. A. Crone, John Doe Corporation, Richard Roe and Jane Doe, Defendants and that the said agreement for the suspension of working requirements upon said property shall be, and it is hereby extended to include the portion of the real property reserved from the operation of said agreement of October 31st, 1934, and nothing in this agreement, or in said agreement of October 31st, 1934 shall be construed as requiring lessees to perform any labor upon said reserved portion other than as required by said agreement of October 31st, 1934 and said suspension of operations agreement thereafter executed and herein referred to.

In Witness Whereof the parties have hereunto set their hands this day and year first hereinabove mentioned.

F. M. O'CONNOR

MRS. STELLA M. O'CONNOR

EXHIBIT "D"

EXTENSION AGREEMENT

This agreement, made and entered into this 4th day of December, 1936, by and between F. M. O'Connor and Stella M. O'Connor, his wife, herein referred to as lessors, and R. J. Miedel, and associates, herein referred to as lessees,

Witnesseth:

That Whereas the parties herein together with D. A. Crone and F. A. Crone did, on the 31st day of October, 1934, enter into an agreement in writing by the terms of which the lessors and the said D. A. Crone and F. A. Crone did lease to lessees that certain piece or parcel of real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as the east one-half ($E\frac{1}{2}$) of the west one-half ($W\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) of Section twenty-three (23) Township thirteen (13) north, range nine (9) east, M. D. B. & M., under the terms and provisions of said agreement, to which agreement reference is hereby made for further particulars.

And Whereas lessees have since the execution

and delivery of said lease acquired the right, title and interest of the said D. A. Crone and F. A. Crone in said real property.

And Whereas said agreement was modified by the parties by supplemental agreement so as to eliminate the reservation of a portion of said real property; to which said supplemental agreement reference is hereby made for further particulars.

And Whereas lessees desire to apply for a patent to said real property to be taken in the name of F. M. O'Connor and Stella M. O'Connor, his wife, as owners of a half interest and R. J. Miedel as owner of the remaining half interest.

Now, Therefore, it is agreed that for and in consideration of the said R. J. Miedel advancing the necessary funds with which to acquire said patent to said real property, lessors will, after said patent has been granted, reimburse the said R. J. Miedel to the extent of one-half of the expenditure so made to acquire said patent. [57]

And lessors further consent that the requirements in said lease for the continued working of the property therein described shall, in consideration of the advancing of said funds by the said R. J. Miedel, be suspended until thirty days after the final determination of the United States Patent Office on the said application for a patent.

Nothing in this agreement shall be construed as requiring the commencement of proceedings to acquire a patent until thirty days after the final determination of the litigation now pending in the Superior Court of the State of California, in and

for the County of Placer, in Action No. 10041, nor shall anything herein be construed to prevent lessees from mining the said real property pursuant to the terms and provisions of said lease, should lessees so elect, during the time that said working requirements are suspended, nor shall the working of said property by lessees during the time said working requirements are suspended be construed as an election on the part of lessors or lessees to in any manner affect suspension of working requirements herein provided for.

In Witness Whereof the lessors and lessees have hereunto set their hands this day and year first hereinabove mentioned.

.....
.....

Lessees

F. M. O'CONNOR

Lessor

MRS. STELLA M. O'CONNOR

[Title of District Court and Cause]

**NOTICE OF ABANDONMENT OF THIS
CONDEMNATION PROCEEDING**

To: The Above Named Defendants, and to Francis T. Cornish, Esq., Attorney for Defendants, F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward, and Irene Brinton, Sued Herein As Irene Gannett:

You, and each of you, are hereby notified that the above-named plaintiff, by Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, upon the express authority and direction of the Attorney General of the United States of America, hereby abandons the further prosecution of the above-entitled condemnation proceeding, for the reason that in the opinion of the plaintiff it is unnecessary to acquire the estate or interest in the land described in the complaint on file herein, or any part thereof, and that the acquisition thereof would not be for the best interests of the plaintiff.

Dated: September 12, 1941.

FRANK J. HENNESSY,
United States Attorney

EMMET J. SEAWELL
Assistant United States At-
torney,

R. B. McMILLAN
Assistant United States At-
torney,
Attorneys for Plaintiff,
United States of America.

[Endorsed]: Filed Sep. 13, 1941. [60]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT DISMISSING
THIS CONDEMNATION PROCEEDING

Now comes the above named plaintiff, by Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, having heretofore been duly authorized and directed by the Attorney General of the United States so to do, and moves this Court to give, make and enter its judgment dismissing the above-entitled condemnation proceeding, for the reason that in the opinion of the plaintiff it is unnecessary to acquire the estate or interest in the land described in the complaint herein, or any part thereof, and that the acquisition thereof would not be for the best interests of the plaintiff.

Dated: September 12, 1941.

FRANK J. HENNESSY,

United States Attorney

EMMET J. SEAWELL,

Assistant United States At-
torney,

R. B. McMILLAN

Assistant United States At-
torney,

Attorneys for Plaintiff,

United States of America.

[Endorsed]: Filed Sep. 13, 1941. [62]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco on Wednesday the 15th day of April, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Plaintiff's motion for judgment dismissing this condemnation proceeding came on this day for further hearing. Robert B. McMillan, Esq., Assistant United States Attorney, appeared as attorney for the plaintiff and Francis F. Cornish, Esq., appeared as attorney for certain defendants. After further hearing the attorneys, it is Ordered that the motion for judgment dismissing this condemnation proceeding be and the same is hereby denied in accordance with an order to be signed and filed herein, to which ruling of the Court the plaintiff then and there duly excepted. After further hearing the attorneys, it is Ordered that this case heretofore set for April 23, 1942, be and the same is hereby continued from April 23, 1942 to June 15, 1942, to be then set for trial at Sacramento, California. [63]

[Title of District Court and Cause.]

OPINION AND ORDER

In this proceeding in condemnation, the United States had the exclusive use and occupancy of the lands of the defendants for a period of one year and eleven months, commencing October 17, 1939. Thereupon, these proceedings were abandoned by the plaintiffs and the lands were returned to the defendants in the same condition as when entered upon by the United States.

The use and occupation of these lands was by virtue of an order of this court authorizing the advance taking of possession and use of the defendants' property to the extent of the interest sought to be acquired therein in this action. This use and occupation resulted in the taking of a substantial [64] possessory interest in the land. To the extent of the taking which actually occurred, there arose an obligation on the part of the plaintiff to pay just compensation therefor to the defendants in this proceeding. And plaintiff's right to a dismissal with respect to whatever interest in the defendants' property had not yet been taken prior to the abandonment, was properly made conditional upon the ascertainment and award herein of just compensation with respect to that which had already been taken from defendants and could not thereafter be returned. Thus was fulfilled the pledge of the United States, inherent in the terms of the constitutional guaranty of the Fifth Amendment, to provide to the owner of private property

taken for a public use, a reasonably expeditious and inexpensive method of ascertaining and paying the just compensation to which he is entitled.

The defendants contend that the United States took from them more than the temporary possession of their lands; that the United States also took the right, during occupancy, to remove all the mineral contents therefrom—sand, gravel and gold—and to use the property for any other purpose incidental to the construction of the proposed dam and reservoir on the American River; and that the United States must compensate them for the taking of this right of user, although the same was concededly never exercised. Defendants, however, fail to show wherein they suffered any pecuniary loss for which the law allows compensation, as a result of the alleged taking of this intangible right. The evidence shows no diminution in the market value of the defendants' lands by reason of any acts committed thereon by the United States under claim of right of user during the period of its occupancy. The defendants still have their lands intact. They didn't lose any sand, gravel or gold. It is established law that just compensation is not to be based on what the condemnor might have gained by the taking, but upon what the condemnee lost thereby.

Evidence was offered by the defendants tending to show the value of the mineral contents of the land separate [65] from the value of the land itself. The defendants still have the mineral contents and just compensation does not entitle them to their

value as well, no matter how we define in legal terms the quantum of the estate or interest taken by the United States.

The fallacy of defendants' position with respect to the extent of their right to compensation herein lies in this,—that due regard has not been given by them to the fact that in every case, value as a basis of just compensation for the taking of an interest in private property, however we regard that interest, must reflect either actual or reasonably probable pecuniary loss to the owner. And defendants' argument that this case must be considered as if the United States not only took possession of their lands, but also depleted the same of their entire mineral contents, regardless of the fact that the lands were returned to the defendants undisturbed, simply loses sight of what the constitutional guarantee of just compensation for the taking of private property for a public use was intended to accomplish. The requirement of just compensation for the taking of property is wholly fulfilled by an award based upon the pecuniary loss shown to have been suffered by the owner.

Whatever basis for the estimation of just compensation would have been adopted in this case had a declaration of taking been filed at the institution of these proceedings, or had these proceedings not been abandoned, need not now be considered. In either of these events, a different factual situation would have been presented calling for the application of such estimates of value which would make defendants whole for whatever pecuniary loss they

had actually suffered or, in all reasonable probability, might be expected to suffer in view of the circumstances there shown to exist.

That value is to be ascertained as of the date of taking is the general rule. This principle has reference to the time at which market values are to be fixed. In this case, no market value, as that term is defined in the law of eminent domain, [66] has been proved as of any date for the intangible right of user allegedly taken by the United States considered as property separate and apart from the tangible thing, the land itself, to which the right relates, and from any possessory interest, therein.

Loss of profits which might have been realized from the use to which the defendants contemplated putting their property, but for the taking, is not recognized in the law as an element to be considered in the fixing of just compensation for the taking. This much defendants concede. It involves the consideration of too many speculative elements to afford any accurate measurement for the estimation of property values. In fact, assuming that defendants' theory of the taking to be the correct one, still they have produced no evidence to this court which would warrant the basing of any estimate of value upon the intangible right of use allegedly taken by the plaintiff when it occupied defendants' property, and of which it could be said the defendants were deprived by the occupancy. The burden of proving pecuniary loss lay with the defendants. They did not sustain this burden by showing loss of profits they might have realized

but for the temporary occupancy of the plaintiff; or the value of the mineral contents of their land, which they still have; or by submitting in evidence a maze of statistical data having no reasonable relation to the ultimate fact to be proved, namely, the compensable pecuniary loss suffered by the taking.

Defendants are entitled to just compensation for the taking of possession of their lands by the plaintiff for the period of plaintiff's occupancy. If rights other than the right of possession did actually vest in the United States when it occupied defendants' lands,—the right for a limited period to remove minerals and to make other uses of the land incidental to the construction of the dam,—no increase in the amount of just compensation has accrued thereby to the defendants over and above that to which they are entitled for the temporary occupancy of their land, because no pecuniary loss has been occasioned thereby to the defendants. [67] The rights were not exercised and there was no consequent diminution in the value of the lands of the defendants. And no market value has been established for them as property separate and apart from the land itself.

The remaining matter for determination is the question of what award defendants shall be entitled to for the taking and holding of the temporary bare possession of their lands prior to the abandonment of these proceedings by the plaintiff. While there is no evidence of the reasonable rental value of the defendants' property, there is sufficient in the record upon which to base an award

of compensation having reasonable relation to the detriment suffered by the defendants as a result of the use and occupation of their property by the plaintiff. The highest estimate of the market value of the fee simple of the defendants' lands, at the time entry was made by the plaintiff, was \$13,000.00. An award of compensation has been suggested by plaintiff in an amount equal to interest at the prevailing commercial rate on the full value of the defendants' property for the period of governmental occupancy, with interest on such amount from the date of taking possession until payment of the award. Defendants admit that an award on this basis for the occupancy of their lands is fully adequate. I also am satisfied that it would afford defendants just compensation for the loss actually sustained by them.

Defendants are therefore awarded the sum of \$1,745.00 with interest thereon at 7% per annum from October 17, 1939, until said award is paid.

Findings of fact, conclusions of law and judgment shall be prepared and submitted by counsel for the plaintiff and counsel for the defendants shall have five days thereafter within which to propose counter findings.

Dated: March 6, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed March 6, 1944. [68]

In the Northern Division of the United States
District Court for the Northern District of
California.

No. 4158-R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

40.34 Acres of land in the Counties of Placer and
El Dorado, State of California, Central Pacific
Railway Company, a corporation, et al,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above entitled action came on for trial on the 16th day of November, 1943, before the above entitled Court, plaintiff being represented by Frank J. Hennessy, United States Attorney, R. B. McMillan, Assistant United States Attorney, M. Mitchell Bourquin, Special Assistant to the Attorney General, Francis N. Foley, Special Attorney, and Thomas W. Martin, Special Attorney; and defendants F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, and W. H. Morrison being represented by Francis T. Cornish; and evidence both oral and documentary having been introduced, and the case being submitted, the Court finds,

I.

That the Complaint herein was filed on the 13th day of October, 1939, to condemn a right, power and privilege of uninterrupted use and occupancy of said land hereinafter described, [69] for a period of Two (2) years from and after the time of the granting and entry of the Order by this Court, granting to the United States of America immediate possession of said land for the purpose of, and with the right, power, and privilege of, during said period of two years, taking and removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of the Ruck-a-Chucky Dam and Reservoir project, and with the right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of the removal of said materials from and out of said land for purposes and uses as aforesaid, provision for recovery of the gold contents of such material to be made upon terms, conditions, and in manner as set forth in Paragraph IV of the Complaint herein, commencing at line 25, page 4, and ending at the word "defendants" in line 15, page 4b, such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out

of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.

II.

That the use for which the hereinafter described property was sought to be taken and condemned by the plaintiff was one authorized by law, and that said property and the taking thereof were necessary and suited to said use.

III.

That all parties interested directly or indirectly in said property have been personally served with process, or have appeared in said action, and that said property, together with [70] all claimants and parties interested therein, are within the jurisdiction of this Court, which has power and authority to enter this Preliminary Judgment.

IV.

That service has been duly made upon the following defendants: Grace B. Maither, Grace B. Maither, as Administratrix of the Estate of A. F. Maither, deceased, Margaret V. McDonald, Mary E. Fowler, James G. Maither, D. B. Richards, as Trustee, Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Der Nehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock, W. D. Stevens, B. J. Corrigan, Georgia Maither, Ada L. Threlkeld, Fred I.

Green, also known as F. I. Green, M. L. Cummings, H. A. McKinstry, J. A. Ware, F. J. Foster, J. G. Maither, Susie M. Maither, George Z. Johnson, John W. Killinger, C. W. Fletcher, The El Dorado and Placer Counties Mining and Power Company, a corporation, and American River Gold Mining Company, a corporation.

That the default of said defendants has been duly entered by this Court for failure to appear and answer, and the Court finds that said defendants have no interest in the property subject of this action or the compensation to be awarded therefor.

V.

That defendants Central Pacific Railway Company, Southern Pacific Land Company, Irene Gannett, and Jack Ward have filed Disclaimers herein, and the Court finds that said defendants have no interest in the property subject of this action, or the compensation to be awarded therefor.

VI.

That defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel were the owners of a valid mining location covering said land at the time of the filing of this action; that on the 6th day of September, 1940, defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel acquired title to said land by patent issued on mineral entry numbered 031856, from the United States of America. [71]

That said defendants are the only persons, firms

or corporations entitled to receive the compensation for the use and occupancy of said land by plaintiff, and no other persons have any interest in said land or the compensation to be awarded for the use and occupancy of said land by plaintiff.

VII.

That plaintiff entered into possession of said land on the 17th day of October, 1939; that plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff.

VIII.

That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land.

IX.

That defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941. [72]

X.

That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself.

XI.

That the sum of One Thousand Seven Hundred Forty-five and no/100 Dollars (\$1,745.00) with interest at the rate of seven per cent from October 17, 1939 until paid, is full, adequate and just compensation for the estate and interest in the land taken herein by plaintiff.

XII.

That the land subject of this action is situate in the Counties of Placer and El Dorado, State of California, and is more particularly described as follows:

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N. R. 9 E., M. D. B. & M., said point bearing S. $89^{\circ} 55'$ W and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N. R. 9 E., M. D. B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence

along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or less, to the northeast corner of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the E $\frac{1}{2}$ of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 23, S. $2^{\circ} 52'$ E., 2,677.00 feet, more or less, to the point of beginning; and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

Wherefore, It Is Ordered, Adjudged and Decreed that the sum of One Thousand Seven Hundred Forty-five and no/100 Dollars (\$1,745.00) with interest at the rate of seven per cent from October 17, 1939 until paid, be and it is hereby awarded to defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel, as full, adequate and just compensation [73] for the estate and interest in said land taken by plaintiff, and all damages resulting therefrom.

Done in open Court, this 24th day of August, 1944.

MARTIN I. WELSH

Judge, United States District Court, Northern
District of California.

[Endorsed]: Filed Aug. 24, 1944. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 24, 1944.

FRANCIS T. CORNISH

Attorney for Appellants F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel,
2140 Shattuck Avenue, Berkeley 4, California

[Endorsed]: Filed Nov. 22, 1944. [75]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 216 pages, numbered from 1 to 216, inclusive contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. 40.34 acres of Land, et al., No. 4158, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal and Counter-designation of Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and

certifying the foregoing record on appeal is the sum of Ninety-one and 55/100 (\$91.55) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of September, A. D. 1945.

[Seal]

C. W. CALBREATH,
Clerk

By F. M. LAMPERT
Deputy Clerk [217]

In the Northern Division of the United States District Court for the Northern District of California

Before: Hon Martin I. Welsh. Judge.

No. 4158

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40.34 ACRES OF LAND IN THE COUNTIES
OF PLACER AND EL DORADO, STATE
OF CALIFORNIA, et al.

Defendants.

REPORTER'S TRANSCRIPT

Appearances

For the Defendants: F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward and Irene Brinton, sued herein as Irene Gannett. Francis T. Cornish, Esq., American Trust Building, Berkeley, California.

For the Government: R. B. McMillan, Esq., Assistant U. S. Attorney; [1*] Francis Foley Esq., and Thomas W. Martin, Esq., Special Attorneys, Department of Justice. [1a]

*Page numbering appearing at top of page of original Reporter's Transcript.

Tuesday, November 16, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready for the Government, your Honor.

Mr. Cornish: Ready for the defendant, your Honor.

Mr. McMillan: In that matter, may it please your Honor, the complaint was filed on behalf of the United States by Frank J. Hennessy, United States Attorney, and Mr. Gus B. Hjelm, Assistant United States Attorney. As your Honor is aware, Mr. Hjelm is no longer connected with the Government. He has been appointed to the Superior Court of the State of California, in and for the County of Stanislaus.

At this time, may it please your Honor, I wish to associate as attorneys for the Government in this case, Mr. Francis Foley, Special Attorney, and Mr. Thomas W. Martin, Special Attorney, and I have been appearing as attorney in this matter, also—R. B. McMillan, Assistant United States Attorney.

The Court: So ordered.

Mr. McMillan: Now, this is a condemnation proceeding. I suppose at the outset your Honor desire that we make our preliminary proof as to the nature of the project and the proposed improvements to be made, in keeping with the Court's practice in these matters, and if that is the order of the Court we will put on that preliminary proof.

The Court: So ordered.

Mr. McMillan: Mr. Goodall.

GEORGE E. GOODALL,

Called for the Government; sworn.

The Court: Do the defendants waive trial by jury? [3]

Mr. Cornish: Yes, your Honor. This was set at our request, and we waived a trial by jury at the time it was set.

Mr. McMillan: That is correct, may it please the Court. Both sides have waived trial by jury.

Direct Examination

Mr. McMillan: Q. Your name is Mr. George E. Goodall, is that correct? A. That is correct.

Q. Now, what is your business or occupation, Mr. Goodall? A. Civil engineer.

Q. Connected with what department?

A. With the War Department of the United States.

Q. United States Engineers?

A. With the U. S. Engineer Office in Sacramento.

Q. And what is your particular capacity now with that office? A. Principal engineer.

Q. And how long have you been connected with that office? A. Ten years.

Q. And how long have you been located here in Sacramento? For the full 10 years?

(Testimony of George E. Goodall.)

A. I was absent from Sacramento for eight months on duty with the office of the Division Engineer in San Francisco, from July, 1925, until April, 1926.

Q. But since then you have been here continuously? A. That is right.

Q. Are you familiar with the project known as the Ruck-a-Chucky Dam Project?

A. I am.

Q. And that is situated where, the proposed damsite? A. It is on the—

Q. The proposed damsite.

A. I beg your pardon?

Q. The proposed damsite was to be located where?

A. On the Middle Fork of the American River, approximately a [4] mile and a half or mile and three-quarters above what is known as the Ponderosa Bridge.

Q. How far from the property here under consideration?

A. It is about a mile and three-quarters, approximately.

Q. North?

A. In a northeasterly direction.

Q. The Ruck-a-Chucky Project was authorized by Act of Congress about when, if you remember?

A. I believe it was in 1935.

Q. What date did you give?

A. I believe it was 1935. I may be incorrect in that.

(Testimony of George E. Goodall.)

Q. Well, it was the Act of August 30, 1935, was it not? A. That is correct.

Q. Authorized the Ruck-a-Chucky Project, and that was for the construction of a dam at that site?

A. That is right.

Q. What was the purpose of construction of this dam?

A. For the storage of debris from hydraulic mining.

Q. That is to say, you were to establish there, in connection with this dam, a reservoir that would impound soil, debris, tailings, and silt that would come in from hydraulic mining?

A. That is right.

Q. It was to further hydraulic mining, and also in furtherance of navigation?

A. That is correct.

Q. To prevent the result of hydraulic mining, that is, the soils, silt and debris, in the tributaries of the Sacramento River, from going into the Sacramento River, and thus impeding navigation, is that correct? A. That is correct.

Q. Who was the engineer in your office who estimated the cost of construction of this dam?

A. All of those estimates were prepared under my direction.

Q. Your supervision?

A. That is correct. [5]

Q. They were made about when?

A. About May, 1939.

Q. And in connection with the construction of

(Testimony of George E. Goodall.)

this dam state whether or not it was required to have any gravel concretes.

A. Sand and gravel were necessary to make the concrete of which the dam was to be constructed.

Q. Was it estimated, the quantity of gravel concrete required in the construction of that dam?

Mr. Cornish: Just a moment.

If the Court please, I object to that on the ground it is incompetent, irrelevant and immaterial. I refer your Honor to the complaint, and in the complaint it sets forth that the Government is condemning the right, for a period of two years, to take gravel from this property for use in the construction, or incidental to the construction of this project. Nowhere in the complaint is the amount of gravel which the Government thought, at the time, it might take, set forth, and in no wise in the complaint does the Government limit itself as to the amount that it would take from the property.

The witness has just testified that this project was authorized by Act of Congress in 1935. The plans were drawn and completed in 1939, four years after the Act of Congress authorizing the construction of this dam. Therefore, your Honor, there is no doubt but what the amount of gravel which could be taken under the right to condemn was at no time limited by the complaint or by Court order, but the Government, under the right which they derived by the Court's order for immediate possession, had the right to take up to the limit of the gravel in this bar, and had the right limited

(Testimony of George E. Goodall.)

only by the amount of gravel that engineers could remove from this bar within a period of two years. Therefore, your Honor, it makes [6] no difference, as this right has been condemned, that the Government intended to take 100,000 yards, 200,000 yards, or 25 yards. Had they desired to protect themselves they should have, in the complaint in some way, set forth the maximum amount of gravel which they would take.

Now, it is our contention, your Honor, that the Government has, by taking an incorporeal right, not anything physical or anything tangible, but the right to remove gravel for a period of two years, for purposes incidental to or in the construction of the Ruck-a-Chucky Dam, where the plans were not crystallized, where there was no way of ascertaining at the time that right was taken—that is, at the time the Government took possession of this property—no way of limiting the amount of gravel that they could have taken; that the amount they might have taken is incompetent, irrelevant and immaterial.

As the Government has condemned this, they have condemned the right to take any amount of gravel that they might elect to take any time they changed their plans.

Now, your Honor has before you the determination of what was the value of that right at the time that the Government took possession.

In other words, to make it a little more concrete, your Honor: Suppose your Honor is the owner of

(Testimony of George E. Goodall.)

this furniture in the courtroom, and I came to your Honor and I say, "I would like to have the right to take as much of that furniture from this courtroom as I want to take in a period of two weeks. How much will you charge me for that right?" That is precisely what the Government has condemned,—the right to take whatever amount of gravel they saw fit for this project, however they may maintain it, for a period of two years. [7]

Your Honor may say to me, "Well, how much of this furniture are you going to take?"

I would say, "I don't care to be limited as to the amount I will take. I may change my plans. I may want one chair, I may want a desk, I may want two chairs and one desk; but I want you to fix the cash price at which you will give me the right to take and keep as much of this furniture as I see fit to take in two weeks."

Your Honor could put but one price, namely, the value of this furniture, for it would be possible for me, under that right, to take away all of this furniture in this room.

So under this complaint, had we gone into court the day following the taking of possession, and had the Government put on this testimony, let us say, that they intended to take a hundred thousand yards of gravel, then the Court could say, "Well, gravel is worth 10 cents a yard; a hundred thousand yards, that is a matter of mathematical calculation, \$10,000," and give the defendants \$10,000 for that gravel right. And then six months later

(Testimony of George E. Goodall.)

the Government decides, "Well, we have to maintain this dam. This dam is a 20-year project. It is going to pay for itself in the storage of tailings over a 20-year period. We want access to that. We are going to pave the road out from Auburn to there so we can get men and supplies over that to maintain the dam."

If they came in within a period of 20 years they would have the right to take all the gravel they required for the paving of that road, whether they paved it with three inches of gravel or four inches of gravel, or used it for concrete paving.

I submit whatever they planned to do or thought they would [8] take at that time is immaterial for the Court to consider in determining the value on the date that the Government went into possession of the right to take as much gravel as they saw fit to take.

Mr. McMillan: May it please your Honor, I will answer in full the statement made by counsel, in my opening statement, when I reach that in this matter.

He gave us the example that if he had the right to take all the chairs in this courtroom for use for some purpose. Suppose he wanted those chairs to furnish a little room across the hallway; Necessarily he wouldn't take all the chairs.

In this case, we didn't take any chair. The point here is this: that under the complaint it is alleged that we have taken an easement for two years, and that is in connection with the construction of Ruck-

(Testimony of George E. Goodall.)

a-Chucky Dam, and in that connection we have the right to take gravel and sand for use in concrete aggregates for the Ruck-a-Chucky Dam. Now, necessarily the gravel that we would take, and the sand for concrete, plainly, under the terms of the allegations of the complaint, would be for use in the construction of the Ruck-a-Chucky Dam, and we also took the use and occupancy of the premises for two years' time, but for no other use besides taking gravel in connection with the construction of this Ruck-a-Chucky Dam.

Now, if this estimate was made, it is a matter which your Honor has before you in allowing just compensation in a condemnation suit. There is no yardstick, there is no peculiar formula. Your Honor went all through that in the Miller case, which was before the Supreme Court, the Supreme Court affirming your Honor on all points.

We are here seeking, in a preliminary way, to show your [9] Honor the estimate that was made before the filing of this complaint, of the amount required of concrete aggregates to be used in the construction of the Ruck-a-Chucky Dam. That is why this suit was filed. We didn't need any more than is necessary to construct the dam. This is the gentleman who had in charge the making of the estimates of the cost of constructing that dam, and I am advising your Honor, in a preliminary way, of what estimate was made for the gravel and sand, the cubic yards required in the construction of the Ruck-a-Chucky Dam, and I submit it is per-

(Testimony of George E. Goodall.)

fectly proper at this time, and I submit it without further argument.

Mr. Cornish: May I ask, your Honor, frankly I have never been able to find out exactly what this Ruck-a-Chucky Dam calls for. I do know this, your Honor—and our testimony will show: that after this landslide occurred at the site of this dam in February, 1940, the Government held onto this property for a year and a half, notwithstanding that the defendants asked for permission to go in and mine that property—

Mr. McMillan: Now, may it please the Court, I don't want to interrupt counsel—

Mr. Cornish: May I finish, please?

Notwithstanding, your Honor, that we asked for permission to use a part of that property, one side of the river, or a part of the other side, the Government took the position that no matter where they moved that dam, no matter where they built it, or how big it was, it was still the same project, and they had acquired certain rights under this condemnation proceeding, and they were going to hold onto those rights and enjoy those rights, no matter where they built the dam.

Now, those facts will be developed in the testimony. A [10] year and a half after this rock slide and the site was buried, the Government held onto the property and denied the defendants permission to go on the property and use it, maintaining that under this condemnation suit they had that right.

Now, your Honor, I didn't draw this complaint;

(Testimony of George E. Goodall.)

I had no part in drawing the complaint. Although, in fact, we had discussed the matter in Mr. Hjelm's office several times before the complaint was drawn, and although we had reached a tentative agreement, the complaint was not drawn in accordance with our suggestions, as set forth in our answer, and as soon as we filed our answer we set forth each and every issue involved in this case, and put the Government on notice immediately as to just what we contended.

If the testimony is going to be, your Honor, that this project called for a certain number of yards of concrete, it would have been the simplest thing in the world for the Government to have said that they were condemning the right to take gravel from this property not to exceed a hundred thousand yards, or if they felt they might change their plans, add a little more to be safe, not to exceed 150,000 yards. But they didn't do that.

Paragraph 3 of the complaint sets forth (reading):

“The said Acts of Congress as set forth in the paragraph last aforesaid, together with said Rivers and Harbors Committee Document No. 50, authorize the Secretary of War to acquire by purchase and condemnation any estate, right, title, and/or interest in and to the real property hereinafter described not now held, owned, and/or possessed by the United States of America, for the purpose of for a period of two [11] years from and after the time of the granting and entry of an order by

(Testimony of George E. Goodall.)

this Court granting to the United States of America immediate possession of said land, removing concrete aggregates therefrom, and from out the same, and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, all of which is in furtherance of the construction and maintenance of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, of which said Ruck-a-Chucky Dam and Reservoir is a project, among others, of preventing the flow of debris resulting from hydraulic mining in and upon and natural erosion which may accumulate from, the watershed of the said Middle Fork of the American River at or above, the place on said river where said Ruck-a-Chucky Dam and Reservoir is being constructed, down the course of said river, and thence down the American River into the Sacramento River, and preventing such debris and accumulations from such erosion from obstructing, impeding and interfering with navigation in the navigable portions of the said rivers."

Then follows, your Honor, Paragraph 4, in which they state the specific rights that they are condemning (reading):

"That in the prosecution of the project for the control of debris in the Sacramento River and its

(Testimony of George E. Goodall.)

tributaries in the State of California, authorized [12] by the River and Harbor Act of August 30, 1935, the Secretary of War is preparing to construct the Ruck-a-Chucky Dam and Reservoir on the said Middle Fork of the American River"—without limitation, your Honor, as to where it will be, but just to construct the dam on said river—(continuing reading):

—“and for the purpose of carrying out said project of constructing said Ruck-a-Chucky Dam and Reservoir, the Secretary of War has selected for acquisition by the United States of America, a right of uninterrupted use and occupancy of the land hereinafter described, for a period of two years from and after the time of the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir.”

Now, may it please your Honor, that is the specific right that has been condemned. The ex-

(Testimony of George E. Goodall.)

perts will differ in this case, your Honor, as to whether there are 750,000 yards—

Mr. McMillan: May I interrupt, your Honor?

Is counsel making his opening statement in this case as to what he expects to prove, or is he making an objection? [13]

Mr. Cornish: I am arguing an objection.

The Court: I suggest if you have an objection to make, make it, and let the Court rule on it; otherwise we will be here interminably.

Mr. McMillan: I wanted to interrupt to say that there are so many things that counsel has stated that are not the facts—

The Court: The objection is overruled. Proceed.

Mr. McMillan: Q. Will you state, Mr. Goodall, what was the estimate made, and when it was made, as to the quantity, the amount of concrete aggregates that would be required in the building of the Ruck-a-Chucky Dam?

A. It was estimated in May, 1935, that approximately 75,000 yards of concrete aggregates would be necessary in the construction of the Ruck-a-Chucky Dam.

Q. And you were the engineer who had charge of figuring the cost of construction?

A. That is right.

Q. And that was the amount figured, 75,000 cubic yards, approximately?

A. That is right.

(Testimony of George E. Goodall.)

Q. In the construction of that dam. Now, let me ask you, do you know whether or not any gravel was taken?

Mr. Cornish: Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The Court: The objection is overruled. Proceed.

Mr. McMillan: Q. Whether or not any gravel whatever was taken in the furtherance of this suit in the construction of the Ruck-a-Chucky Dam?

A. There was none.

Q. None whatever? A. That is right.

Q. For your information, the complaint in this action was filed on October 10, 1939, and the order of possession was made on that date. It appears that although we claim only technically—— [14]

And I submit that the proof, may it please your Honor, will show this before we conclude——

——that the plaintiff entered into possession on or about October 17, or 18, 1939. Did the plaintiff ever construct the Ruck-a-Chucky Dam?

A. No.

Q. What came to pass to prevent that, Mr. Goodall?

A. On February 28, 1940, a large amount of earth and rock slid down over the proposed dam-site and covered up the stream bed portion to such depth as, first of all, to render the construction of the dam uneconomical, and, secondly, large masses of rock were still hanging in the debris on the left abutment area that would have had to have been

(Testimony of George E. Goodall.)

removed to prevent their sliding down, rolling against the dam, and thus injuring the dam.

Q. Did the War Department engineers then determine to abandon the particular site for the reasons which you have given?

A. The War Department did.

Q. Immediately, or was some time required?

A. It was some time afterwards.

Q. What was done in connection with that?

A. Considerable exploratory work was done. The original exploratory tunnels on the left abutment were buried by this material that had slid down from the left abutment, and we have the contractor's power shovel excavating material from the upper tunnel, exploratory tunnel, on the left abutment, to determine what had happened in that locality.

Q. That requires much time? How much time?

A. It was along in May—I forget the exact date—in May of 1940, that the portal of that exploratory tunnel was uncovered.

Q. Was it afterwards determined by the War Department that it [15] would be necessary to select another site? A. It was.

Q. And did you figure on selecting a site near there downstream or upstream?

A. At first we explored a site downstream, about a mile downstream from the original site, and we spent some months in diamond-drilling and tunneling in that area, and it was found that while apparently good rock was noted on the surface, and

(Testimony of George E. Goodall.)

easy following down to considerable depth, that mud seams persisted and existed to such depth as to make it of doubtful security to build a dam of that size and type at that location, so that further exploratory work was then continued upstream from the site at which the last slide occurred, and four sites in that locality were mapped and preliminary geological explorations made to determine the most feasible locality.

Q. And was a determination made?

A. Yes.

Q. About when?

A. About November, 1940, or December, 1940.

Q. November, 1940? A. That is right.

Q. Did you ever go ahead with that site?

A. No, we didn't.

Q. Do you know the reasons and can give them?

A. Well, we have been concentrating practically all our energies since that time on defense work and war work, and there was no money available for the construction of a debris dam.

Q. That was not a power plant?

A. It was—there was to have been no hydro-electric power in connection with the Ruck-a-Chucky Dam.

Q. And further appropriations were withheld unless the plants that were under construction had some phase of furnishing or generating power, is that correct?

A. Well, I cannot say as to that. I am not familiar with the policy as set forth in Washington.

(Testimony of George E. Goodall.)

Q. In considering the site that you had in mind, the second site, had that been selected you would have still had need for the gravel that is described in this complaint and in your testimony?

A. That site downstream, that is correct; we had proposed to build an arch concrete dam at that site. In that case we would have needed the concrete aggregates to construct that dam.

Q. So it then remained your intention while exploring the second site, that upon its selection you would still have taken gravel from this property under consideration? A. That is correct.

Q. Now, after it was finally determined that the second site was not satisfactory, and you were selecting the third site to which you have referred, up the river—how far up the river was that from the original site of the Ruck-a-Chucky Dam?

A. It was about four or five miles.

Q. State whether or not it was determined then that you would no longer have any use of the gravel here under consideration, the concrete aggregates, upon the selection of the third site.

A. It was proposed to construct a rock fill dam at that upper site. Some concrete aggregates would have been necessary in connection with the face and slab to render the rock fill watertight, and for the construction of the spillway, but the exact quantity was never determined, inasmuch, as I say, we proceeded with defense work and war work very largely from that time on.

(Testimony of George E. Goodall.)

Q. But it was clearly determined, was it not, that you had no further use for the gravel to be taken from the property we have here under consideration? A. That is correct.

Q. It was absolutely not feasible, and furthermore it was a different type of dam, so far as material was concerned, to be [17] constructed?

A. That is correct. And there were deposits of gravel in the stream bed of sufficient quantity for the much smaller amount of concrete that would be necessary in the construction of the concrete face and slab and the spillway works at the proposed rock fill dam.

Q. Did your department then proceed to advise the War Department that you no longer had use for the gravel, and desired to abandon these proceedings and to so notify the Attorney General of the United States to take appropriate steps?

A. I cannot state definitely as to the notification of the Attorney General. The office of the Chief of Engineers was advised that we had tentatively chosen this upper site approximately four miles upstream.

Q. Well, was it your understanding at that time that the Government had never entered into possession of this property at all?

A. That is true.

Q. Do you know whether it had entered into possession of the property?

A. It was my understanding that some power

(Testimony of George E. Goodall.)

poles were constructed, or set in that property, but none of the aggregates had been removed.

Q. Before the completion of the power project and the time to take the gravel had arrived, this landslide took place? A. That is correct.

Q. You don't know whether or not that you sought through your department and through the Attorney General to abandon this property?

A. I don't know that of my own knowledge.

Mr. McMillan: I will give you a copy of this map, Mr. Cornish, for your own convenience. You may keep that copy (handing document to Mr. Cornish).

And I have another copy of this map. It is entitled [18] "Vicinity Map," and I will give that to the Clerk, and the Clerk may, for the convenience of the Court, have it at hand (handing document to the Clerk).

Q. I will show you, Mr. Goodall, what purports to be a vicinity map, location map, location of proposed dam, Sacramento River and tributaries, Sacramento debris control, Ruck-a-Chucky Dam, Middle Fork of the American River. Is this an official map of your department? A. It is.

Q. Was it prepared under your direction and supervision? A. That is correct.

Q. Is it a true representation of the conditions—especially the physical conditions that it undertakes to portray? A. That is right.

Mr. Cornish: Mr. McMillan, before you offer

(Testimony of George E. Goodall.)

that map, may I ask the witness a couple of questions concerning it?

Mr. McMillan: I have no objection if your Honor has none.

Mr. Cornish: Q. I refer, Mr. Goodall, to the west bank of the American River, as it appears on the east half of the west half of the southeast quarter. Do you see the portion to which I refer, about the center and top of the sheet?

A. Yes.

Q. You notice that a gravel bar is shown there on the inside of the bend; there is also a gravel bar shown as an island; and there is also a gravel bar shown down below.

A. That is correct.

Q. Are those three gravel bars in the east half of the west half of the southeast quarter?

A. I didn't get your question.

Q. Do those three gravel bars actually appear on that portion of the east half of the west half of the southeast quarter, Section 23?

A. Not in their entirety. The major portions of them.

Q. You say this map was prepared under your direction? [19]

A. That is correct.

Q. Is it not true that the west bank of the river, as it flows through that property, was not actually surveyed, but was only estimated?

A. I can't definitely answer that question as to the precise procedure of the field work.

Q. You don't know that?

(Testimony of George E. Goodall.)

A. No, I don't.

Q. You know, do you not, that the only bar, or the only deposit in which the Government was ever really interested, was that which is designated the Cherokee Bar?

A. That is correct.

Q. And you have no knowledge of your own of any survey being made of any portion of the east half of the west half of the southeast quarter of Section 23, other than that portion which is designated as Cherokee Bar?

A. Not as to the definite procedure of field work, no.

Q. I see. So far as you know, then, the west bank of that stream may or may not be accurately depicted on this map?

A. I might say that the location of those bars is subject to change after periods of high water.

Q. Do you know what the condition is of the west bank of that stream?

A. Right now? No, I don't.

Q. Do you know whether it is movable or fixed?

A. The bank would be fixed, but the bar would not necessarily be fixed.

Q. Do you know whether there is any bar along the west side of that river?

A. Not now. I haven't been up there for two years.

Q. As a matter of fact, the west bank of that stream, all the way along, is a steep hill, isn't it—it is not subject to moving?

(Testimony of George E. Goodall.)

A. The bank is not subject to moving, but the bar is. [20]

Q. And doesn't the main course of the stream run right next to that bank all the year around?

A. I don't know.

Mr. Cornish: You don't know. Very well.

Mr. McMillan: Have you any objection to this map being introduced in evidence? It is a vicinity map, as stated on the map itself, Mr. Cornish.

Mr. Cornish: Well, it is only this, Mr. McMillan: that we have had two surveys taken of that property, and they both indicate that the river is entirely on the east half of the west half of the southwest quarter, and on the Government's map they show a portion of the gravel bar being off the property, and I have been told that the Government, in making their survey, did not accurately survey that edge of the bank, but only surveyed the bar.

Mr. McMillan: Now, may it please your Honor, counsel is testifying again in this case.

The Court: Yes.

Mr. Cornish: No, your Honor, I have no intention to testify. I am merely stating the reason why I would object to it. Except in so far as it shows that bank, your Honor, I have no objection to it. If that bank is just sketched in, and it is not intended to show that a portion of the river runs off the property, I have no objection to it, but if it is intended to accurately depict both sides of the river as it courses through this property, I object on

(Testimony of George E. Goodall.)

the ground that there has not been any foundation laid, because this witness does not know, he has no knowledge as to whether any accurate measurements were taken. As I say, it has been surveyed once by ourselves and once by someone else who is disinterested, and once by the Government, and almost every survey you look at gives you different lines. If this has been [21] accurately surveyed, I have no objection, but if it has been sketched in, then I do object.

Mr. McMillan: May it please your Honor, we will offer it subject to any objection that may develop in the course of the trial as to its correctness. I had merely in mind this being preliminary proof directed to the Court's attention of the nature of the project and the proposed improvements, to give your Honor a general picture of the project there—and, as indicated by the map, it is a vicinity map—and have the witness point out to your Honor the project here under consideration, because I have no doubt that your Honor would want to go out and view the premises, and I thought at this time that could be introduced in evidence subject to any corrections hereafter to be made as developed by the proof.

The Court: Admitted.

Mr. McMillan: I ask it be admitted in evidence and marked as Government's Exhibit 1.

(The "Vicinity Map" referred to was received in evidence and marked U. S. Exhibit No. 1.)

(Testimony of George E. Goodall.)

Mr. McMillan: Q. Now, Mr. Goodall, will you please do this—you are an engineer, and you certainly should be able to describe the things better than I can—I want you to give information to his Honor as to the location of the property here under consideration, and the elevation of the Middle Fork of the River there, and the location of the Ruck-a-Chucky proposed project. Just explain that in your own way, all physical conditions as portrayed by that map.

Now, with respect to the location on that map of Ruck-a-Chucky proposed dam.

A. The proposed Ruck-a-Chucky dam is located here (indicating). [22]

Q. Where is the property that we have here under consideration?

A. The property under consideration is outlined by this heavy line in this rectangle here (indicating).

Q. In what portion is that from the proposed dams site?

A. It is practically west, a little north of westerly from the dam.

Q. What is that river I see running here?

A. This is the Middle Fork of the American River (indicating).

Q. And running in what direction?

A. It is running a little north of west. West being about in this direction (indicating), and north (indicating). It runs a little north of west.

Q. There are no contours depicted on that map?

(Testimony of George E. Goodall.)

A. No, there are not.

Mr. McMillan: I think that is all, Mr. Goodall.
You may cross-examine.

Cross-Examination

Mr. Cornish: Q. Mr. Goodall, you considered —your office considered that wherever that dam was built on this river, it was still the same project, did you not? A. We did.

Q. And it was your intention at all times while you were looking for another site, to use as much of these concrete aggregates as you might see fit to use for the construction of any dam, wherever it might be on this river?

A. That would depend on where the dam was built, and the type of dam finally chosen in an alternate site.

Q. Let me put it this way: that it was your intention, when you looked at and examined the site downstream from the original site, to use this gravel if you built a concrete arch there?

A. That is correct.

Q. And it was your intention, if you selected a site where this [23] gravel is more available than any other gravel, and you required any concrete aggregates, to use this gravel, was it not?

Mr. McMillan: May it please your Honor, I think that is purely speculative and remote, as to the quantity of gravel that might be required in another site. In giving your Honor a history of the project, necessarily it was to advise the Court of

(Testimony of George E. Goodall.)

the delay that was taken in this matter. Counsel is seeking to show by this witness that if we selected another site, why, we might have used more than 75,000 cubic yards of gravel. It is purely speculative. It just happens that we didn't select the second site, and it further happens that at the site selected, which was the third site, that there was no necessity for gravel. So I submit it is conjectural and going into a speculative realm. This property was condemned for the Ruck-a-Chucky Dam described in this complaint. Now, if some other site were selected that required the use of the gravel, that is another thing, but it didn't happen. This is unique. No gravel was taken——

The Court: Any objection?

Mr. McMillan: I offer that objection, on the ground it is too speculative and remote.

The Court: The objection is sustained.

Mr. Cornish: Q. This site which you were examining, which was, you say, downstream—it was downstream from the original Ruck-a-Chucky site?

A. That is correct.

Q. And can you point out with this indicator just where on the map that site was?

A. Well, it would be very difficult to point it out exactly, because the topographical features are omitted from this map, and there is nothing to identify the exact location, except that we know that it was above this 12 by 14 foot bridge, and it would be somewhere approximately in here [24] (indicating on map).

(Testimony of George E. Goodall.)

Q. Somewhere in the vicinity of where this pale light line crosses across the stream?

A. Generally speaking. I wouldn't identify it as being exactly at that point.

Q. But thereabouts? A. That is correct.

Q. And the other point, you say, was four miles upstream from the site of the proposed—the original Ruck-a-Chucky Dam?

A. Approximately, yes.

Q. Now, those investigations to determine the site were made pursuant to this same Act of Congress authorizing the construction of the Ruck-a-Chucky Dam, were they not? A. Yes.

Q. Are you able to tell at this time, had the second site been selected, the number of yards of concrete aggregates that would have been required for the construction of that dam?

Mr. McMillan: I object to that, may it please your Honor, on the ground it is purely speculative, too remote, and necessarily this engineer has made no mistake at all with reference to these later sites.

Q. You have made no estimates with reference to that, have you?

A. We made an estimate of the lower site.

Q. But it was never selected, as I understand?

A. No, because it cost too much money.

Mr. Cornish: May it please your Honor, may I again repeat what I said a few moments ago, that this whole thing is speculative? This is one project that was authorized by an Act of Congress of 1935, and it was left up to the War Department

(Testimony of George E. Goodall.)

Engineers to select the site and draw the plans, and as I pointed out to your Honor, the exact location, the exact site, the exact size, the exact construction, the total volume of concrete aggregates, and all that, was never determined, but no matter [25] where they moved this, they were still acting pursuant to the same Act of Congress, which is the Act, your Honor, set forth in the complaint, and which authorized the condemnation of this property, namely, this Rivers and Harbors Act of August 30, 1935.

Now, I interposed the objection to the witness testifying to the volume of concrete aggregates that were required—that he anticipated would be used in the original dam, because it was incompetent, irrelevant and immaterial in the manner in which it has been condemned. Then when we attempt to find what gravel would be used in the second site, counsel objects to that as speculative. I am merely trying to point out, your Honor, by this witness' testimony, that the Government has taken the position consistently throughout that regardless of the amount of gravel they needed, regardless of how that might change, whether it diminished to one yard or nothing, as it has, or whether it increased to double the capacity of the bar, they contended, and they were right in their contention, that as long as they were building a dam pursuant to that Act of Congress, as long as they were building that project, they had the right to take all the gravel.

Now, it was up to the Government, if they de-

(Testimony of George E. Goodall.)

sired to protect themselves, to limit the amount of gravel they could take, or give the defendants some protection, so that we could have gone into court on the day this was taken, and the Court could, at that time, fix a cash value on the amount of gravel that would be required for this project.

We are not interested, your Honor, in buying gravel on a royalty basis. We are interested in the cash value of the incorporeal right known in law as a profit, that the Government may condemn in this property, and we are interested in the value [26] of that profit at the time the Government went in possession. And, as I see it, your Honor, that is the only issue in the case, is how much gravel did the Government have a right to take under this complaint; and, secondly, what was the cash value of that right? Not the extent they thought they might enjoy it, but what was the value of that right at the time that the Government took possession of that right?

Now, that is my understanding, your Honor, of the rules on eminent domain, that where the Government takes possession, the value is fixed as the cash value, the reasonable market value at the time that it takes possession, and if we are correct in that assumption, your Honor, why, the question of damages to the defendants, as a result of being deprived of the use of their property—we are perfectly willing to waive any damages from that score—but we do feel that as the Government has condemned it, that there is a certain definite rule

(Testimony of George E. Goodall.)

for determining the value of that gravel, and the value of the right of taking that gravel in any amount they saw fit to take it in a period of two years.

The Court: The objection is overruled. Proceed.

Mr. Cornish: Q. Do you recall on what date your department determined that it would not take gravel from this bar?

A. Not the exact date, no.

Q. And do you recall how long a period of time elapsed between the time that your department decided that it would not take gravel from this bar and the time that the United States Attorney filed an abandonment of the rights taken under this proceeding?

A. No, those are not matters that I handle.

Q. What time was this upper site selected?

A. The third site? [27]

Q. Yes.

A. It was in the very end of the year 1940, as I remember.

Q. And do you recall just—I will withdraw that. Is that the site referred to in this Rivers and Harbors Document 50 as the Volcano Site?

A. No, it is not.

Q. And you are familiar with that Volcano Site, are you?

A. I visited it over nine years ago. I haven't seen it since.

Q. And where was this site that had finally been selected, with reference to the Volcano Site?

(Testimony of George E. Goodall.)

A. It was considerably downstream. It was somewhat below the mouth of Otter Creek.

Q. Below the mouth of Otter Creek?

A. That is correct.

Q. And it was the intention of your department to construct that dam pursuant to this same Act of Congress of August 30, 1935?

A. That is right.

Mr. Cornish: I have no further questions, your Honor.

Redirect Examination

Mr. McMillan: Q. Mr. Goodall, if you selected another site, and it cost much more to build, the later selection, in view of the fact that this damsite was being constructed in aid of hydraulic mining, the miners would have to be consulted, would they not, as to this additional cost of the dam before you could proceed?

Mr. Cornish: To which we object, your Honor, on the ground it is incompetent, irrelevant and immaterial; highly speculative; and calling for an opinion and conclusion of the witness.

Mr. McMillan: I think it is a matter that the law itself takes care of, may it please your Honor.

I have no further questions.

The Court: The objection is overruled. You may answer.

A. It was considered that in view of the way the law was framed [28] in regard to hydraulic mining, that inasmuch as the hydraulic miner has

(Testimony of George E. Goodall.)

to repay the cost of the dam by a tax on each yard mined in the pit, that the costs were excessive for the hydraulic miner to pay, and that rather than being a benefit to hydraulic mining, if we built a dam that was too excessively expensive, it would act as a deterrent to hydraulic mining, and that it was necessary, in the interest of aiding the hydraulic miners, to find a site at which storage could be bought at a price the miners would be able to pay.

Mr. McMillan: Q. And they would have to practically guarantee the repayment of this cost, would they not?

A. The law requires that no work shall be undertaken—this is not verbatim—until assurances satisfactory to the Secretary of War have been received that the miners will pay, by this tax, the cost of the reservoir.

Mr. McMillan: That is all, Mr. Goodall.

Mr. Cornish: May I ask one question?

Recross Examination

Mr. Cornish: Q. From and after May of 1940, when you abandoned the site, the original Ruck-a-Chucky site, from and after that date you had no assurance from any hydraulic miners that they would rent any tailing space, did you?

A. Tailing space was not sold definitely as to the location, precise geographical location of the reservoir, as I recall it, but rather, that they would

(Testimony of George E. Goodall.)

store their tailings in a reservoir to be constructed on the particular stream in question.

Q. And the price that they were to pay for that storage depended upon the cost of the dam, didn't it?

A. That is correct.

Q. All right. Then from the time that you abandoned the Ruck-a-Chucky site in May of 1940 you didn't know what a dam would cost, [29] did you?

A. No.

Q. And you didn't have any contracts with any miners from that time on for the storage of tailings behind any dam, did you?

A. Yes; the original contracts——

Q. I mean other than those original contracts.

A. We had those.

Q. All right. And did those contracts provide that the price for storage would change if the cost of the dam changed?

A. The price for storage was not set forth in the contracts at the time they were written, because at the time those contracts were written the dam had not yet been built, and nobody ever knows exactly, when they start to build a dam, how much it is going to cost by the time they get through, so it was impossible for the Government to set forth the precise rate of payment for storage in any reservoir.

Q. Then that matter was left open, and I take it was subject to the dam being put wherever the Government might see fit to put it?

(Testimony of George E. Goodall.)

A. That is correct.

Mr. Cornish: That is all.

Mr. McMillan: That is all.

(Witness excused.)

Mr. McMillan: Now, may it please your Honor, that completes our preliminary showing. We concede at this time that counsel has the right to open and close.

The Court: We will take a ten-minute recess.
(Recess.)

The Court: You may proceed.

Mr. Cornish: Before starting my opening statement, may it please your Honor, Mr. McMillan and I discussed the matter of viewing the premises. We understand that your Honor may want to view the premises, and it is agreeable to both sides that your [30] Honor do so. It requires driving up from here to the property of approximately an hour and a half, and an hour and a half to return. If your Honor desires to view the premises, would you prefer to view them before we make our opening statement, or afterwards? Whichever is satisfactory to the Court is satisfactory to us.

The Court: Well, it makes no difference to the Court.

Mr. Cornish: It is just a question of time. I would probably spend the rest of the morning on an opening statement, and that would leave this afternoon, and the trip could not be made any more

than to get there and back between 2:00 and 5:00 this afternoon.

The Court: That would be satisfactory.

Mr. Cornish: That would be agreeable to your Honor?

The Court: Yes.

Mr. Cornish: Very well.

May I draw a rough sketch on the board for illustration?

The Court: You may.

(Whereupon Mr. Cornish drew a sketch on the blackboard.)

(Further discussion between the Court and counsel in regard to viewing the premises.)

Opening Statement on Behalf of the Defendants

Mr. Cornish: On that board, your Honor, is a rough drawing of the property. It measures 40 acres—40.34 the complaint states, but 40 acres more or less,—and approximately in proportion one by four. In other words, your Honor, from north to south it measures a half-mile, and from east to west an eighth of a mile.

The surveys which have been made by the Government and by our surveyors are substantially the same so far as the dimensions [31] of the property are concerned, the main difference being a variation of approximately a foot in the location of the base line, south line, and the Government survey tips the property a little more to the west, not over two degrees in compass variation. But the river, as it enters this property, the Middle Fork

of the American River, is flowing almost due west. It makes a bend on this property and flows first south, and then it bends slightly and flows to the southeast, and finally travels along the east boundary of the property. The river, your Honor, flows to the west, turns and flows south, then cuts across the bar going to the southeast, and as it reaches this point continues to flow due south, and in making this last bend, the east boundary of the property is in the middle of the river.

Along the west side of the property, almost at the edge, is a deep bank. It appears, as you look up the bank, a more than 45 per cent grade, a 45 degree angle. And on the east side of the property is a similar bank which rises almost as abruptly, and leaves a channel which is roughly 500 feet in width, through which the river courses. That channel is fairly narrow at the northern end of the property, as the river comes on, and it widens out, and it is roughly a trough 500 feet in width running from north to south on this property.

The bottom of that wide channel is almost entirely sand and gravel, and the river itself, as it courses through the property, rather than flowing on a solid bedrock, flows on a bed of gravel.

That gravel, the testers of it say, consists in part of the original gravel which was deposited there before the white men came to California, and in parts of—the top layer is hydraulic wash which has come down from the hydraulic workings up above this property, and the deposit of which was stopped by the Sawyer [32] case, and later has been

controlled by the Debris Commission. It is debris of this type which covered this property with what varied from nothing up to 12 feet in depth, that the construction of this dam sought to avoid.

On the inside of this bend, your Honor, (indicating on map) between the east bank and the river, is a fairly sizeable gravel bar. On the west side of the river, on the southern end, triangular in shape, is a second gravel bar. The gravel bar on the inside of the bend differs from that on the outside of the bend in that the gravel bar on the inside has, on the surface, a much higher sand content, and a much smaller boulder content.

Then in high water, your Honor, when the stream is between maximum flood stage and low water, there is a channel which is appreciably higher than the main bed of the stream, which I have designated as a high water channel, and some of the water takes, you might call it, a short-cut across the northwest corner of the bar where the main channel runs down as I have designated.

Your Honor will recall that when the United States offered this exhibit, that we questioned the witness concerning the exact course of the west bank of the river, for the reason that the surveys differ, and ordinarily the surveyor surveys only one bank, which appears to be usually the east bank, and then sketches in the west bank where he imagines it was, without paying particular attention to accuracy. But it is the contention of the defendants that at the time the river enters the property up at the northerly end, up until the time

it dissolves, you might say, the boundary at the southern end, that both banks of the river are on the defendants' property.

This property, your Honor, was taken as a mining claim in 1935, and was involved in some litigation, and finally, when that [33] litigation was completed, the parties decided that they would take out a United States Land Patent, and the property has since been patented by the United States Government to R. J. Miedel, one of the defendants, and to Fred O'Connor and Stella O'Connor, his wife, with the result, your Honor, that the title of the property is one-half interest in R. J. Miedel, and a one-half interest in F. M. O'Connor and Stella O'Connor, his wife.

They intended to mine this property out with a dredging process, but were informed that the Government was about to build the Ruck-a-Chucky Dam, and according to maps which were shown to them, this bar, which is the inside bar—called on the map Bar 1—was designated on that map with the words, "Only available sand and gravel."

Realizing that if they put mining machinery into the property, that condemnation proceedings could be instituted and there might be some delay and some damage to them as a result of being shut down, they approached the Government, explained to the War Department Engineers what they had, that they wanted to mine it, that they weren't in the gravel business, but realizing that the Government had to have the gravel, and the result was that negotiations continued for a period of about a

year and a half before this condemnation suit was started.

For the most part the Government somewhat discounted the defendants' claims that there was any gold in the property, but finally, after a number of discussions, the Government declared that it anticipated, but would not bind itself to it, anticipating using approximately 70 to 75 thousand yards—cubic yards of concrete aggregates, which they estimated would displace what they called 100,000 yards bank run. That would mean, your Honor, that in order to get 75,000 cubic yards of concrete aggregates [34] of the sizes desired, it would be necessary to displace 100,000 cubic yards, run that through a trommel, and size out that portion which was too large or unsuitable for concrete aggregates, and that wastage would have been approximately one-fourth of the gravel as it lay there on the property. So they would excavate 100,000 yards, throw away 25,000 yards, which was of inappropriate size, and retain 75,000 yards for use in the concrete aggregates.

The defendants contended that they preferred to mine the property, but since they realized that a condemnation suit was possible in order to get the gravel, and that they were more or less at the mercy of the Government for that purpose——

Mr. McMillan: Now, may it please your Honor, I take it counsel is making an opening statement of matters he expects to prove, and matters of realization and mercy I don't believe are altogether susceptible of proof.

Mr. Cornish: I meant that in a proper way, Mr. McMillan, that if the Government saw fit to condemn it, they could do it. In other words, we could do nothing about it. In other words, all the Government had to do was file suit, and we had to sell it at the amount the Court determined was the reasonable market value.

Mr. McMillan: What I had in mind is whether in your opening statement you are going to adhere strictly to what you expect to prove in this case, or whether it is an argument.

Mr. Cornish: Yes, sir, your Honor. I think it is a perfectly proper opening statement.

Mr. McMillan: I won't make any objection. You may proceed.

Mr. Cornish: Very well.

So, your Honor, as a result of those conferences the War Department Engineers agreed that in order to protect what the [35] defendants contended to be their gold interest, that certain safeguards would have to be put around the contractor who was going to work this gravel. The defendants sought to limit the Government and the Government's contractor in some way, either as to the area of the bar or of the property that would be worked, or as to the depth of the gravel that would be worked, because they felt that if they were afforded a portion of this property to mine while this gravel extraction process was going on, and they knew that the ground would not be disturbed below a certain level, that they would not be substantially damaged. It culminated in a tentative

agreement for the payment of a cash price, and in addition to that the defendants, doing certain things, your Honor, which are set forth on pages 4, 4-A and 4-B, of the complaint—the substance of those provisions is that the contractor would raise the gravel to a certain elevation; it varied, depending on the size of the gravel; the gravel would be made available to the defendants for recovery of the gold from the gravel by force of gravity. In other words, any lifting of that gravel that was necessary was to be done at the expense of the Government, so that as it went through the gold concentrating devices, or gold recovery devices, that it would be carried by force of gravity, without any lifting or mechanical means on the part of the defendants. In addition to that the Government tentatively agreed to furnish water in an amount not to exceed 2,100 gallons per minute, and power not to exceed 20 horsepower connected load.

The reason behind that, your Honor, was that to recover the gold in connection with a gravel process, required a stationary plant, whereas the defendants contemplated the construction and use of a portable plant. The stationary plant was not usable as [36] a portable plant, nor was the portable plant usable as a stationary plant.

So it was tentatively agreed that if the defendants constructed this portable—this stationary plant to use in connection with the gravel recovery and sizing process, that the Government would pay a cash consideration, would elevate the materials so they could be carried through the gold recovery

devices by force of gravity, furnish water up to 2,100 gallons a minute, and furnish electricity to the extent of 20 horsepower of connected load, which was felt, as a result of the conferences, would be adequate to take care of the defendants' rights. Then, your Honor, before the final confirmation of that plan by Washington, the contract had been let to the contractor who started work on the dam, and who desired immediate possession, and in order to gain immediate possession the defendants insisted upon a commitment from the Government as to whether this proposition that had been tentatively agreed would be acceptable, and denied the contractor permission until they had some definite word that their rights would be protected along the lines that they had discussed.

Consequently, the Government filed this condemnation suit and took immediate possession, and in its attempt to safeguard the rights of the defendants, set forth these various provisions that appear on pages 4, 4-A and 4-B, of the complaint. But fearing that the defendants might not avail themselves of that provision, the Government also condemned, in the alternative, as they set forth in page 4-B of the complaint, starting at line 7, your Honor (reading):

"In the event said owners, R. J. Miedel, F. A. O'Connor, and Stella O'Connor, shall fail or refuse [37] to carry out the requirements as above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event the plaintiff shall have the option to

either take the said concrete aggregate without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants.”

In other words, your Honor, under this proceeding the Government, if the defendants fail to do so, had the right either to perform these things themselves, and give us the gold, or to take the whole thing without recovering the gold, and turn the whole body of gravel that they removed over to the contractor to treat as he saw fit.

Now, we set forth in our answer, your Honor, that these provisions which are set forth in the complaint are inadequate for the protection of the rights of the defendant for the reason, your Honor, that starting at line 3½ on page 4-B, appears this condition (reading):

“The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than five per cent.”

There is nowhere in those specifications that any limitation is placed upon the plaintiff, or upon the plaintiff's contractor, as to the rate at which the contractor would remove gravel from the bar.

In our preliminary negotiations with the Government it was mentioned that approximately 100 cubic yards of gravel an hour [38] would be removed.

It then developed, after the suit was filed, that the contractor was going to bring in a device

which would process 250 cubic yards of aggregates per hour, which meant that the gold recovery devices that had been contemplated by the defendants were entirely inadequate and could not cope with the load that might be turned upon them, and they were put in the position where they either had to anticipate the whim and will of the contractor who went in for the plaintiff, and be ready to take care of and recover their gold just as fast as it was thrown to them, or take the loss themselves. In other words, your Honor, if it became necessary to change the plant to $2\frac{1}{2}$ times its originally contemplated size, it became necessary to have $2\frac{1}{2}$ times the water, and the Government was only obligated to furnish 2,100 gallons of water per minute, and if it was necessary to change the plant to $2\frac{1}{2}$ times its original size, the electrical energy of not to exceed 20 horsepower connected load would no longer be adequate; they would require electrical energy of 50 horsepower of connected load.

So we set forth in our answer, your Honor, that these provisions did not protect us, and that it was impossible for the defendants to comply with these provisions.

Now, that is material in this respect: While there is no doubt that no gravel was ever taken by the Government, I return again to what I said before, that the Government did not condemn anything tangible, anything specific. They did not take so many yards of gravel from a certain place. They took the right to take gravel, which is an incorporeal right. It is like a right-of-way. It gives

no interest in the property itself; merely the right to use that property. They didn't limit themselves as to the amount that they would take.

Now, I have drawn this diagram, your Honor, and it will develop that approximately 30 acres of that 40 acres contains gold-bearing gravel, and that gravel extends, the defendants believe, under this bank and clear to the east edge (indicating on map). The defendants know, however, your Honor, that this cabin is 156 feet from the east edge of the property, and they know, from a shaft that has been sunk, and a drift that has been run under the hill, that gravel having in excess of \$1.00 per cubic yard exists for a distance of 56 feet under that hill. Whether it extends the final hundred feet or not no one knows, because no one has been under there. But the indications from the findings there as that drift was run were that that gravel would continue of the same general consistency.

Now, if the Government intended to limit itself to only 100,000 cubic yards, your Honor, it is the contention of the defendants that they could have limited themselves as to area or as to depth, or made some provision for the safeguard of the mining rights of the defendants.

Out of this 30 acres, your Honor, the estimates vary from 750,000 cubic yards of gravel, up to 1,400,000 cubic yards of gravel. But taking the lowest figure, 750,000 cubic yards of gravel, on that property, the Government, in taking 100,000 cubic yards, they now say, from this bar, Bar 1, saw fit by their condemnation suit to take not only

100,000 cubic yards from Bar 1, but to tie up Bar 2, and to preclude the defendants from taking possession of any part of the whole 40 acres, and reserving unto themselves the exclusive right of possession and uninterrupted occupancy of this property, for the purpose for a period of two years of taking whatever gravel was necessary for the construction [40] and the maintenance of this project.

Now, it is the contention of the defendants that since the exact amount has never been ascertained, since the Government has taken the possession of it pursuant to that Act of Congress—and I believe they are justified, as that Act reads—that that dam can be fixed anywhere that is suitable to the Government, providing that the hydraulic miners can afford to store their tailings behind it; that since that dam can be moved anywhere, and can be of any size or dimensions, as the engineers may design it, that the amount of gravel which the Engineering, or the War Department, the United States, the plaintiff, will take from this property, has never been determined. True, your Honor, we reach the anomalous situation that the Government has condemned an incorporeal right, and they have never enjoyed it, but the fact remains that they have condemned a right, and we are to determine not the utility of that right to the Government as it eventually materializes; we are determining in this action the cash value of that right at the time it was taken, and the defendants will contend that one of the items of damage in this case is the cash

value that must be placed on the day that the Government took possession of the uninterrupted right to occupy this property for a period of two years for the purpose of taking out gravel for the construction and maintenance of the dam.

Now, your Honor, even though we might concede that the Government could, by then plans—its then plans—limit the amount of gravel that would be used in the construction, we still have that element of maintenance, and just what gravel would be required for the maintenance of that dam I have no way of anticipating, nor has the Government in its preliminary showing made any indication of what might be contemplated or what might be [41] considered as the maintenance of that dam. But the language that was used, as your Honor will note in reading the complaint, is about as broad and gives the Government about as broad rights in this property as it is conceivably possible for anyone to have, and it is the defendants' contention that if the Government sees fit—even though they may be ill-advised in doing so—if they see fit to condemn more than they need, more than they want, they must pay for the right which they condemned, notwithstanding they didn't eventually use it, and that they eventually abandoned it.

Now then, in addition, your Honor, as another element of damages beyond the value of that right, we must necessarily concern ourselves with the value of the gold that is in that bar. And there will be evidence offered to show the recoverable gold values and the cost of recovery of that gold.

It is the defendants' contention that they are entitled to show what their profit would have been from the mining of this property during the one year and eleven months which the Government excluded them from possession, and that they are entitled to—in addition to the cash value of the right which the Government took they are entitled to the interest on the money which they would have made or which would be reasonably expected to have made had they been permitted to continue with their mining operations and not been excluded.

And while I realize, your Honor, that these things do not turn upon the hardships of the case, or upon the misfortune of any of the parties, we must bear in mind that if the Government was going to take a hundred thousand cubic yards of gravel from Bar 1, there is no conceivable reason in the world why the defendants should be excluded from the mining of Bar 2, nor is there any conceivable reason why the defendants should be [42] entirely excluded from Bar 1, because the evidence will disclose that the supply of gravel in that property east there, right out on the surface, available for excavation, was far in excess of 100,000 cubic yards that the Government estimated that they needed, and that the Government knew that at the time they condemned this property, and that we expressly sought to limit it for the purpose of enabling the defendants to mine; notwithstanding the fact that all those matters were well-known to the Government, they saw fit to take the entire 40 acres, and they must have done it for some reasons, your

Honor; they must have contemplated other uses of the gravel might exceed their anticipated uses, and they wanted to have it available in the event that they did.

Now, the defendant will also contend, your Honor, that since it was impossible for them to comply with these conditions, these so-called safeguards, that were supposedly thrown about this condemnation proceeding in order to protect the defendants; that since it was impossible for them to comply with those conditions, that the option was left open to the Government to take not only the gravel for concrete aggregates, but to take it without the recovery of the gold content. So actually, the way this condemnation complaint has been drawn, unless the defendant shows to the court by satisfactory and convincing evidence that there is gold of the recoverable value of a certain amount in these bars, and that there is gravel to a certain extent in these two bars, as this is drawn the Government has taken the right to remove both gold and gravel, and to use both gold and gravel for the construction and maintenance of this dam, consequently over and above the ordinary gravel value of this property the Government has taken the gold value—or at least taken the [43] right to have the gold value on this property, and to deprive the defendants of the gold value of this property—in other words, if your Honor can put yourself in my position in advising these people: The Government comes to them and says, “We want to take gravel from your property. Your gravel contains

gold. We are not the least bit concerned with that gold. If you can keep up with our contractor on the recovery of gold you are welcome to keep it; if you can't keep up with our contractor on the recovery of gold, then we want to take both the gold and the gravel, and not even bother about your gold, and put it into our dam."

Now then, you advise your clients how much you will charge the Government, what is the fair market value of the right to go into a person's property and take not only their gravel, but their gold, and to take as much as you want for a period of two years for a particular project; the exact, or even the approximate amount of gravel which will be necessary for them to take has never been determined, and has not today been determined. That is the question which, as I see it, your Honor has to decide, and it is toward the proof along those lines that the defendants' testimony will be offered.

(Whereupon a recess was taken until 2:00 o'clock p. m., at which time the premises in issue were to be viewed.) [44]

Tuesday, November 16, 1943

2:00 o'clock p. m.

(By prearrangement the Court, the Clerk, the Court's secretary, counsel for the respective parties and the court reporter, assembled at the Federal Building and were transported to the premises in issue, and upon arrival thereat, the premises were

viewed by the parties mentioned and the following proceedings took place:)

Mr. Cornish: Both the Government survey and ours are practically the same. They show the southeast corner in the middle of that open space (indicating). They show the cabin just about the same spot, and measurements show that the line is about 150 feet in from the cabin.

Then the question that was raised on the board this morning was over the west line, and this main channel stays in the same place the year around. There is a middle channel that leaves the main channel and makes that little island (indicating).

As the Government has surveyed it, the bar will run anywhere from 25 or 50 feet into the hill from here (indicating). The south line is just about where that green tree is. There is a single green tree (indicating), and the south line is just about where that green tree is, that is growing out of the bank there. The south line is just about on a line with that single tree. There is a dead tree, and there is another tree on farther down. That is about the south line.

The north line is beyond that abandoned cabin that you see there (indicating).

The bar is approximately a half-mile in length and an eighth of a mile in width.

The question was raised this morning as to the size of this [45] island. In most of the surveys, they surveyed only the west boundary of the bar, and that is approximately correct, but this island that is shown is supposed to be this little place

here (indicating), with a high water channel that cuts through, and at low water there is no water in there at all, and that island does not come down nearly as far as the cabin.

The river right along at the cabin is not nearly as wide as is shown here on the map (indicating). If you look down the river you will see that instead of cutting off at this angle, as shown on the map (indicating), the river makes a bend off this way (indicating).

It is the defendants' contention that the only part of the river that is accurately shown is that portion that bounds the bar here (indicating). The rest of it is merely estimated. There is an approximately even trough all the way down, with gravel, the same width all the way. The west bank of the stream is almost straight—that is, the west bank of the channel itself is almost straight. The water, of course, makes this cut across; the whole course of the river all along, with the exception of a few spots where a reef is showing through, is running over a pebble debris deposit. At high water, at flood time, the water comes clear up to the cabin. In fact, the tree that you see leaning over there (indicating), has been partly washed out. That brings in a new deposit of sand each year.

After that first high flood, then there is ordinary high water, and the ordinary high water runs along the edge of this bank (indicating) to one level, and then drops down to the second.

Mr. Foley, are you going to put on any evidence

of the location of this test, or those test pits to determine the gravel [46] content?

Mr. Foley: We will probably determine that after you get through with your case.

Mr. Cornish: Do you want to point them out here, to show about where they are located?

Mr. Foley: No.

Mr. Cornish: There will be some testimony that the shaft behind the cabin there, where you see the little sort of windlass there,—that shaft is caved in now, but when it was open, it was 22 feet to bedrock (indicating), and there is also a drift—there will also be testimony that a drift runs in from that 56 feet into the hill.

As I mentioned in the opening statement, as to the two bars, there is one down below, which almost all rock, and this one up above, which has a sand top (indicating). There is another spot about which there will be some testimony, and that is regarding a test pit that was put down. That was at the north end of the bar. If you want to walk up that way, I can show you just about where it was, but it was a little bit beyond that large tree, that green tree that you see standing there (indicating), and out possibly 75 feet toward the stream.

This machinery that you see (indicating) is some equipment that is immaterial to the cause. That machinery was installed and was washed out long before the Government became interested in it.

Mr. Morrison: Where did you say that you claim the south line is?

Mr. Foley: The south line is about where that green tree is there (indicating).

Mr. Morrison: No, that is not it exactly. It is within 150 [47] feet of that pile of lumber (indicating) below the green tree. It is a little farther down than you say.

(Thereupon the viewing of the premises was concluded and the party was returned to Sacramento, California, arriving at 6:30 o'clock p. m., whereupon an adjournment was taken until Wednesday, November 17, 1943, at 10:00 o'clock a. m.) [47a]

Wednesday, November 17, 1943
10:00 O'clock A. M.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, it was understood yesterday that after your Honor had returned from viewing the premises and court had resumed its session that the Government would make its opening statement. I therefore, at this time, on behalf of the Government, make this opening statement:

Opening Statement on Behalf of the Government

Mr. McMillan: The Rivers and Harbors Act.

with which your Honor is familiar, was of August 30, 1935, and that Act authorized the construction of the Ruck-a-Chucky Dam, the dam here under consideration, and that authorization was in pursuance of and adoption of the report of the Committee on Rivers and Harbors of the House of Representatives of the United States, known as Document No. 50. That Act authorized the construction of the Ruck-a-Chucky Dam.

Afterwards the Secretary of War authorized the filing of this action for the purpose of taking the property here involved and described in the complaint, and directed the Attorney General to bring the appropriate action.

On October 10, 1939, this action was commenced, and on that date summons was issued. It was commenced under the provisions of this Act, and also under the provisions of Section 591, Title 33, of the United States Codes, and an order of possession was made that date under the provisions of Title 33, Section 594, of the United States Codes. [48]

It appears that on or about October 17th possession was taken of the property through the contractor of the United States—that is, one George Pollock—and the possession was due to the extent which has already been indicated to the Court and contended by the Government of constructing a power line across the property, and in that connection setting up four poles, and for that reason it has been contended by the defendants that the Government took possession at that time and remained in possession from the beginning of this

action until we gave notice of abandonment on or about September 13, 1941.

Now, as has already been pointed out to your Honor, the complaint in this action sought to take an easement of two years over this property for uses in connection with the construction of the Ruck-a-Chucky Dam, and also to take concrete aggregates, that is, sand and gravel, necessary for the construction of that dam or incidental thereto.

It has already been pointed out and shown in the evidence that the construction engineers, in estimating the cost of this dam, had estimated that the amount of concrete aggregates would not exceed 75,000 cubic yards of gravel and sand.

Sometime before this suit was filed, as appears already by the statement made to your Honor by Mr. Cornish, negotiations were under way between the Government and Mr. Cornish's clients, the defendants appearing before this Court. The plan was that the Government was to take the 75,000 cubic yards of concrete aggregates and was to have the use of the premises for two years under an easement, and that the Government would pay a cash sum to the defendants to enable them to set up machinery there for the purpose of recovering the gold contents of the gravel that was taken. In short, the Government would feed the [49] gravel to the machinery set up, the defendants would then extract the gold from the gravel, and the tailings were to be returned to the Government.

Now, that was to be done by them, and if they

didn't do it, the Government could do it, and if neither the Government nor the defendants did it, the Government would take the concrete aggregates with the gold.

I call your Honor's attention, in connection with the delay, to some significant matters: Necessarily, the answer not having been filed in this case until March 25, 1941—the complaint was filed in this action October 10, 1939—it is significant in this record that the parties must have continued to negotiate until that answer was filed, and I think that the complaint itself, on its face—in fact, I am sure of it—shows that numerous defendants were joined in this action, and it is obvious that there was much title clearance.

The testimony in this case will show that the Defendants R. J. Miedel and F. M. O'Connor and Stella O'Connor did not make an application for a patent to the property until on or about August 4, 1938, and not until after this suit was filed, that is, on October 30, 1939, did they pay the money required in order to obtain the patent. And still later—long later, may it please your Honor—on August 28, 1940, the patent was issued, and not until that time did they actually have a patent or a title under patent to this land. This land, as a matter of fact, had been withdrawn from entry on or about January 11, 1928, and was not restored by the Government for mining locations until August 28, 1934.

Now, may it please your Honor, evidence has already been admitted, and there will be additional evidence, to show that [50] the construction was

not undertaken, for the reason that a landslide occurred up there on the river near the dam on February 28, 1940, and after this landslide took place considerable time elapsed to determine whether or not the debris could be cleared, and that it would be practicable, feasible, and economical, to go ahead with the construction of the dam at that place.

It was finally determined that that could not be done, and arrangements were made between the Government and the contractor satisfactorily for his release from the contract for the construction of the dam at that point.

Later on, as already indicated by the testimony, the Government set about to find another site on the Middle Fork of the American River and, as has already been shown by the evidence, too, about two miles below this property, or in that vicinity, they gave consideration for a considerable time to a proposed site there. After exploring that it was finally decided it was not practicable, feasible, or economical, to select a site at that point, and later on, as the evidence has already shown, a site was selected further up the river, about four miles above the original site selected, and in the selection of that site it was determined that different material would be required than the gravel concrete, and therefore it became manifest that the gravel which was sought to be taken by this action would no longer be required. Steps were then taken to go ahead and abandon the originally proposed site, and the War Department did notify the Attorney General that this site was no longer necessary or practicable

for use for the reasons which I have indicated, and instructed the Attorney General to bring appropriate proceedings for the dismissal of the condemnation proceeding.

Accordingly, on September 13, 1941—it will be remembered [51] by your Honor that the answer of the defendants in this case was not filed until March 25, 1941—the Government filed notice of dismissal and notice of abandonment of the proceedings. That is on September 13, 1941.

The defendants contend, of course, that the Government was in occupation of the premises until the notice of abandonment was filed. This notice of abandonment was given under the provisions of Section 1255(a) of the Code of Civil Procedure of the State of California (reading):

“Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with such Section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceedings and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorneys’ fees. These costs and disbursements, including expenses and attorneys’ fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed, as in civil ac-

tions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within 30 days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where [52] the said action is dismissed 40 days prior to the time set for the trial of the said action."

A motion was made in pursuance of that section for the entry of a judgment of dismissal and abandonment. It was opposed by the defendants on the ground that we had gone into possession of the property and had remained in possession of the property for one year and eleven months, and that it would be inequitable to permit the abandonment, because of the possession which we had taken.

They further showed in that regard, or undertook to show, that it would be inequitable to force them into a court of claims when the matter could be heard before this Court, as to the compensation they were entitled to for the Government's use and occupancy of that property for that period of time.

The matter came on for hearing before His Honor, the Honorable Michael J. Roche, and it was continued from time to time. Finally, on May 6, 1942, the Court denied our motion to abandon on the ground that we had taken possession, and that it appeared to the Court inequitable for us to abandon the proceeding.

After that time, may it please your Honor, a motion was made before your Honor for leave to go upon the premises to test the gravel to deter-

mine their recoverable gold contents. That motion was opposed by the defendants. The hearing was had before your Honor, and your Honor made the order.

Since that time representatives of the Government, experts employed by the Government, have gone on the premises and have made tests of the gravel there to determine, and have determined, the recoverable gold contents. And in that connection a survey was made, and the proof will show that, and a proper survey by [53] experts, showing that the cubic yardage of the gravel on the premises from which gold may be recovered is not 1,400,000 cubic yards, or even 750,000 cubic yards, as contended by counsel for the defendants, but 527,000 cubic yards of gravel, and covering an exposed acreage area of 18.1 acres, and not 30 acres, as contended by counsel.

Now, may it please your Honor, the Government will produce here as witnesses, and testimony will be given to show that the fair market value at the time of the taking of this property, or at the time when it was sought to be taken, on October 10, 1939, taking into consideration all the uses to which it can be put, and conceding that the most profitable and highest use to which the property can be put is that of gold mining, and these witnesses being familiar with the tests made by the Government as to the quantity of recoverable gold, and some of these witnesses having taken part in making these tests, will testify that the reasonable market value of that property at the time

of taking, taking into consideration these tests, the yardage which I have referred to, did not exceed, several of the witnesses, the sum of \$15,000. That is for the entire property, with all the gravel and with all the sand and all the alleged gold that may be recovered from there. That is for the entire patent, the mining claim.

It will be remembered in this case that we took an easement for two years, with the right to recover gravel and sand, take gravel and sand to the extent I have already pointed out,—that is, 75,000 cubic yards of concrete aggregates.

Now, these witnesses are eminently qualified witnesses. One of the witnesses, Mr. R. D. Smith, a mining engineer for many years, connected with the Natomas Company, as I stated, it [54] will be shown that his qualifications as a mining engineer are eminent; his experience has been wide; he is familiar with mining properties and mining operations throughout this entire district, and he is familiar with this particular piece of property; he has studied that property, made examinations of that property; he has gone over surveys; he is familiar with the quantity of yardage there of gravel; it has been brought to his attention as a factor in making his estimate, the tests made by the Government; and other information he had, and studies. And it will be his testimony that the fair market value of that entire piece of property at the time of taking will not exceed \$12,000.

We will call Mr. A. F. Bishop, another gentleman of eminent qualifications, a member of the firm

of Lord & Bishop, knowing dredgers and dredging operations, having been engaged in the dredging business many years, and familiar with this entire mining district, familiar with this property, having studied and examined the property, and being one of the experts employed by the Government to make the tests on the property; taking into consideration all the matters which I have already indicated to your Honor, his testimony will be that the property, on August 1, 1939, the fair market value in cash would not exceed the sum of \$12,000.

The Government will also call, and he will testify here in this proceeding, Mr. A. F. Giddings. He is vice-president and, in fact, he is a third owner, of the General Dredging Company, which is operating a dredging business and mining business here, and has been operating a dredging business and mining business for many years. In fact, it will be shown his company is the owner of five dredgers, what are called "doodle-bug dredgers," with their equipment. And his testimony, being familiar with [55] all the matters, and having made the examinations and studies which I have already indicated, will be that the property, the fair market value at the time of taking, was not in excess of \$12,000.

We will call other witnesses, notably Mr. G. A. Bigelow, an eminent mining engineer connected with the Yuba Consolidated Mining Company, which is the successor of Hammond Mining Company. This gentleman is familiar with mining operations; he is familiar with mining properties; he is familiar with the best methods of mining; he is

familiar with this particular property, has made a study and examination of it, and he is familiar with the gold tests that have been made there; and likewise his testimony will be that the fair market value of that property at that time, taking into consideration all these matters I have indicated, did not exceed the sum of \$12,000.

We will call other witnesses with similar familiarity and qualifications. Their testimony will be not to exceed that figure.

We will call as a witness in this case a gentleman who has had wide experience in prospecting and in mining; who owns several mining claims right in that vicinity, one above and one below; who is peculiarly familiar with this property, having been once upon it, being interested in the very property here under consideration, and he has made a very careful study and examination of that property; he, too, is familiar with the tests which have been made showing the quantity of gold in this gravel, and he will testify that in his opinion the property, the entire property, mining claim, at the time of the taking by the Government in this case, did not exceed the fair market value of \$10,000. [56]

It will be shown and it will be contended by the Government in this case, may it please your Honor, that there never was factually or legally a taking of property here.

I call the Court's attention to the fact that this case is different from so many condemnation suits which have been tried before your Honor and which have been filed in this Court. Most of the con-

demnation cases filed, at the time of filing the complaint, there is filed with it a declaration of taking, and with that declaration of taking there is a deposit with the registry of the Court of the estimated just compensation for the taking of the property.

Now, upon the filing of the declaration of taking, the title vests in the United States. The property then becomes the property of the United States, and there is just one issue to be determined,—that is, the just compensation for the taking of the property, and the persons who are entitled to receive that compensation.

This is not such a case. No title ever vested in the United States upon the filing of this complaint. This complaint was filed under the provisions of the Rivers and Harbors Act I called your Honor's attention to, and the provisions of Section 591, Title 33, of United States Codes, and the character of complaint that is filed therein is similar to the character of complaint filed in a condemnation proceeding brought under the laws of the State of California.

As your Honor is well aware, upon the filing of the complaint in condemnation in California, no title vests, and no title vests until the judgment has been rendered in the case and the award has been finally paid, because even after the judgment has been rendered, the plaintiff has 30 days' time within which to abandon [57] the proceeding. And that is also the law of the United States.

In this proceeding, upon an affidavit showing the necessity for the property, and also that there are

funds available to pay any award which may be made in the case, also the necessity of taking immediate possession, and estimating, as in this case, the compensation for the taking, \$5,000, the order is made putting the plaintiffs in possession.

Now, in a proceeding of that character, similar to a proceeding under the law of California, no title vests. In California it is often contended that if the case does not come to trial for more than a year after the issuance of summons, as is the case here, the time of fixing the compensation, the market value of the property, is not at the time of the issuance of summons, but at the time of trial.

Now, were that so in this particular case, may it please your Honor, at the time of the trial of this case there would be no taking, because the evidence will show in this case that we took no gravel, that we took no sand, that we took no gold. We didn't take anything. We contend that in this case the proper measure of compensation is to determine the market value of the property at the time of the taking, and in accordance with the testimony which will be given by these experts who are familiar with the value of the property at the time of the taking, if the Court is satisfied that their testimony is correct, that the value of the entire property is \$15,000, and we, only having the use and occupancy of the premises for one year and eleven months, they would then be entitled to the proper rental value on that valuation of the market value for the easement for two years, a fair rental value based upon the valuation of the entire property at

\$15,000, would be, at seven per cent interest, not to [58] exceed seven per cent interest for one year and eleven months, plus interest on that amount of interest, figured upon the original valuation of the property. That is our contention.

It is our contention, and the authorities, we will contend, agree with us, that there is in this case no possible way of fixing it otherwise, because it is unique—we took nothing. We kept these people out of possession of the property; we were in use and occupation of it. They are entitled, we concede, to receive the proper rental value of that property for that time, and nothing else. They have the gravel, they have the gold, and it is not a case, may it please your Honor, where the Government stepped in and there was an enterprise in operation. There was no mining enterprise in operation. Counsel contends that they should be compensated because they were not allowed to continue their mining operations. Well, there was none.

The testimony in this case will show that there were no mining operations at the time the Government went in and took possession of that property.

Now, whether or not, if the Government had not taken possession and kept them out of possession, they would have started mining operations, we contend, is too conjectural, and too remote to be taken into consideration in fixing the just compensation in this matter, and, may it please your Honor, we are upheld in that contention by a long line of Supreme Court decisions. I think the latest expres-

sion on that of our Supreme Court is the Powelson case, the Tennessee Valley Authority matter, that compensation is not to be paid for just a proposed project; compensation is not to be paid for frustration of any proposed project.

I emphasize, there is no mining enterprise in operation here. [59] There is now on that property no mine set up.

I think I can explain it and set it forth in clearer words by reading just a few sentences from that decision itself. That decision to which I have referred is *United States versus Powelson*, which was decided May 17, 1943, and I have it here as reported in 63 Supreme Court Reporter, at page 1047. It will be contended that this language, this ruling, is wholly applicable to this particular situation (reading):

“There are numerous business losses which result from condemnation of properties but which are not compensable under the 5th Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken,”——

citing *United States versus Miller*, a case which was tried before your Honor, and other cases (continuing reading)——

——“not all losses suffered by the owner are compensable under the 5th Amendment. In absence of a statutory mandate,”——

again citing *United States versus Miller* (continuing reading)——

——“the sovereign must pay only for what it takes, not for opportunities which the owner may lose. On the one hand are such cases as *Monongahela Navigation Company versus United States*, where it was held that the United States had appropriated a growing enterprise to its own ends and must make compensation accordingly. But it is well settled in this court that, ‘Frustration and appropriation are essentially different things.’ ”——

citing many cases (continuing reading)——

——“Thus in *Mitchell versus the United States* the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project, even though the business could not be reestablished elsewhere,”——

and so forth.

I have pointed out that this is a case in which, under their contention, there was a disappointment in a project that they may have had in mind, that they may have intended; there was a frustration of some project that they may have had in mind, just like in this *Powelson* case, where there were millions of dollars involved, and where the Supreme Court of the United States overruled the Circuit Court of Appeals, and a judgment amounting to around a million dollars which had already been reduced by the Circuit Court of Appeals was fur-

ther reduced down to around a hundred thousand dollars, as I remember.

There could not be any other measure, may it please your Honor. If the valuation were to be based upon the amount of recoverable gold, all sorts of speculative elements would enter into it, as the Court has said in other cases, especially in timber cases. A suit is brought to condemn, we will say, a lumbering district. It has been held time and time again—the leading case, I think, is *Morton versus United States*—you cannot set up a business there and contend that if you cut down the trees, and that you manufacture lumber, and all that, and value them separately, that that is an item to be taken into consideration separately from the value of the land. These all enter into the elements of value of the land itself, the highest market value. [61]

In reference to minerals, I have a brief statement here which is supported by authorities in California, supported by Supreme Court decisions, and supported by a very well known Pennsylvania case involving an entry which is similar to this (reading):

“Where the land taken contains minerals the measure of compensation is the market value of the land with the minerals in it, and the value of the minerals cannot be shown separately.”

I am reading now from 29 *Corpus Juris Secundum*, page 1043, and I cite your Honor to the several cases cited there, and additional cases cited under Section 246, page 749, 20 *Corpus Juris*.

To proceed and fix value upon that theory, may it please your Honor, would mean this: Counsel contending that he lost the opportunity to mine this property, to set up a project and go ahead, and therefore he could have taken out millions of dollars, and that he is entitled to interest on that, would be a case of not only after receiving an award of that character, but that he could go ahead the next day and sell the very property itself, because nothing had been taken. It would be a case in which afterwards, after the war, for example, that the price for gold may be higher and the cost of equipment may be less.

The witnesses to whom I referred, may it please your Honor, in fixing the market value of the property, will testify with reference to the mining of that property up there, the best methods of mining, the most feasible methods of mining, and in that connection they will testify that this is a difficult piece of property to mine. It is suggested the best method would be the doodle-bug with its equipment, but in that connection they say that the property is not easily accessible, and that there [62] is bedrock there which is hard to work in, and that the main portion of recoverable gold is in the few feet of gravel just above the bedrock, and they have taken into consideration this factor: that to operate that singly is speculative; it might not prove very profitable. That if they were united with other mining claims around there it would be in a better situation, but to go in there and mine this alone is an altogether different situation. They

will testify that it is dangerous and unsafe to take equipment in there at certain seasons of the year; that the time to go in there and mine on that property and take a dredging outfit in there would be from the month of May through the month of November. During the other months of the year, the winter time, the water is high, and there are storms, and taking machinery in there might result, as has taken place now and then in dredging operations, that the entire equipment is lost. But in going in there and dredging gravel of this small quantity, it would not be practicable, it would not be economical to go in there for a few months of the year and leave your equipment there and come back the next year, but you should come in with equipment large enough, with a doodle-bug large enough; you have to go in there with a doodle-bug, and with the equipment, we will say, of two yards' capacity, and be able to go ahead and dredge at least 100,000 yards a month, and during that period, we will say from May to November, this entire yardage would be dredged. But to go in there with one of smaller capacity, you couldn't complete the work seasonably. An outfit of that size would cost in the neighborhood of from ninety to one hundred thousand dollars.

It will be contended in this case, may it please your Honor, that obviously, if you take an easement to a piece of property, [63] to one piece of property, a property that is not a part of a larger parcel to which severance damages could come, an easement of two years' time, certainly wouldn't

have a greater value than the fee of the property. Necessarily so. In this case, to give to the defendants in this case a valuation higher for this easement of two years, this occupancy of two years, we not having taken anything, would be a case in which the tail wags the dog, and, as I pointed out before, having been allowed that valuation and compensation of that character, they, still having the gold, the sand, the gravel, and the property, could turn around and resell it for the full market value.

I think this valuation on the measure of damages we contend for is the correct one, and it is the only one under the circumstances of this case that may be adopted.

In this case I have called your Honor's attention to enough facts and testimony that will be introduced in this case to indicate that it is unique in character. We haven't taken anything from the property. The problem is the valuation of the use and occupancy of that property for a period of one year and eleven months, and we contend that that is what they are entitled to, and nothing more.

May it please your Honor, I submit that the claims made by counsel in this case, and the valuations that he is contending for, are, relatively speaking, as fantastic and as exaggerated and speculative as those made by one of the defendants in this case, Mr. W. H. Morrison, when he filed an affidavit resisting our motion to go in and make tests on that property, in which affidavit he stated that (reading):

“In addition to said free gold, $1\frac{1}{2}$ percent of the total deposit of gravel and sand on said real [64] property is what is commonly called black sand; that said black sand contains platinum, irridium, and other valuable mineral elements of the platinum group; that approximately 45,000,000 pounds of said black sand is in said deposit, and said black sand is of the reasonable value of \$1.00 per pound or more.”

In other words, in an affidavit filed in this proceeding one of the defendants in this case is making the statement that there is \$45,000,000 worth of black sand in that property which your Honor viewed yesterday.

Mr. Cornish: May it please your Honor, Mr. McMillan, in his opening statement, has proceeded upon the theory that the most that the Government can be required to pay is the value of this property as it was—

Mr. McMillan: May it please your Honor, counsel has made his opening statement and we have made our opening statement.

The Court: Yes. I think you should defer that to your argument.

Mr. Cornish: There are just one or two points I would like to call your Honor's attention to before we put on testimony. I believe it will be helpful to your Honor in listening to the witnesses. But if Mr. McMillan prefers I don't do so—

Mr. McMillan: I respectfully submit, may it please your Honor, that the orderly process will be that as testimony is offered the parties make

their objections and motions to strike, and if there are any arguments to be made, they may be appropriately made at that time.

The Court: Yes.

Mr. Cornish: Does your Honor intend to take a recess this morning? [65]

The Court: Yes. We will recess for ten minutes.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. Cornish: May it please your Honor, attached to the complaint as Exhibit A is a copy of a map which shows the meets and bounds description of a survey of this property made by the War Department Engineers. I have just spoken to Mr. McMillan, and I would like to obtain from him, if he has it available, for the purposes of the record, the meets and bounds description of the gravel bar on the inside of the bend, as surveyed by the War Department Engineers, which was placed on a map similar to this.

Your Honor will note on the exhibit the points are shown as survey points. On that portion of the river, on the land lying immediately to the east, the Southern Pacific Land Company, your Honor will note a series of lines and dots indicating survey points, and the survey at that time continued on down the river, and there is a survey in the possession of the engineers showing the meets and bounds of that gravel bar, and if those figures are available I would like to introduce them in evi-

dence, or if not available at this time, maybe after lunch——

Mr. McMillan: May it please your Honor, I have neither the figures nor the map referred to here. I will cast about and check it up at lunch time, and see if I can get them.

The Court: You may do that.

Mr. Cornish: Very well.

I will call Mr. Morrison.

WILLIAM HARLAN MORRISON,

Called for the Defendants; sworn. [66]

Direct Examination

Mr. Cornish: Q. Mr. Morrison, you are the W. H. Morrison named as one of the defendants in this case? A. Correct.

Q. And where do you live, Mr. Morrison?

A. At the present time, in Walnut Creek, on the Pacheco Highway.

Q. And you are engaged in business, are you?

A. I am.

Q. And what is your business?

A. Jewelry business.

Q. And how long have you been engaged in the jewelry business.

A. At various times, 40 years.

Q. Have you, during that time, been engaged in any other business?

A. I have; mining.

(Testimony of William Harlan Morrison.)

Q. Mining. And in what districts or localities have you been engaged in mining?

A. Alaska; various sections in Alaska. In San Luis Obispo County, California; and in Calaveras County, Amador County, now in El Dorado County.

Q. In your operations in Alaska you were concerned with the mining of what commodities?

A. Gold.

Q. And in Calaveras and Amador Counties?

A. Also gold.

Q. And in El Dorado County?

A. El Dorado County, gold and associated elements, whatever happens to be there.

Q. And in San Luis Obispo County?

A. Manganese, chrome, and molybdenite.

Q. During what years were you engaged in the mining of gold in Alaska, Mr. Morrison?

A. 1901 to 1904—no, three years; I left there in 1903.

Q. And during what years were you engaged in the mining of gold in Calaveras and Amador Counties? A. 1907 to about 1909.

Q. During what years were you engaged in the mining of chromium in San Luis Obispo County?

A. From 1914 to the close of the war, 1918. [67]

Q. In your mining operations in El Dorado County, during what period were you engaged in those?

A. I first became interested in El Dorado

(Testimony of William Harlan Morrison.)

County in 1932. No serious work was done until 1934.

Q. And that has continued—your connections, although not active at all times, in mining, have continued to date? A. To date.

Q. In your jewelry business, Mr. Morrison, are you concerned with the retail sales of jewelry only, or with other lines?

A. Manufacturing as well.

Q. And has your time in the jewelry business been devoted primarily to retailing, or manufacturing? A. I would say about half and half.

Q. And in the course of your business of a manufacturing jeweler, what has been the extent of the work you have done and the knowledge you have acquired of gold and other precious elements used in the jewelry line?

A. Refining, assaying, determining the qualities and quantities of different elements.

Q. In this project on the Middle Fork of the American River, Mr. Morrison, have you had any associates in business with you?

A. Yes, I have.

Q. And who are those associates?

A. R. J. Miedel, R. B. Somerby, a man by the name of Fisher, who is now deceased, and, of course, the original owners.

Q. Mr. and Mrs. O'Connor?

A. The O'Connors.

Q. And in the course of your operations in El Dorado County in association with Mr. Miedel and

(Testimony of William Harlan Morrison.)

Mr. Somerby, what duties have you each performed?

A. Mine has been the management; I have had charge of the property.

Mr. McMillan: May it please your Honor, I didn't hear that [68] answer. May it be read?

The Court: Yes; the reporter will read the answer.

(Answer read by the reporter.)

Mr. Cornish: Q. Now, at the time you and your associates first became interested in this property in 1934, were you at that time operating it? A. We were in 1934.

Q. Were you actively managing it at that time, or was someone else managing it?

A. We started the plant under my supervision, but under the management of Tex Crone and Frank Crone.

Q. During the time that the property was under your supervision and under the management of the two Crones was any mining machinery installed?

A. Yes, there was a complete plant put in there, a stationary plant, at the upper end of the claim.

Q. That was at the north end?

A. North end.

Q. And was any mining done?

A. Considerable mining was done, yes; a cut perhaps 300 feet long. However, I didn't measure it exactly.

Q. You say a cut was about 300 feet long?

A. About 300 feet long.

(Testimony of William Harlan Morrison.)

Q. You made no accurate measurement of it, however? A. No, not at all.

Q. How deep was that cut, and how wide?

A. Approximately 10 feet deep, and the width varied, because the plant was stationary and the line fanned out——

Q. How wide would you say it was?

A. The width varied. Perhaps 40 feet wide at the south end.

Q. Forty feet wide at the south end, tapering, I take it, to a point at the north?

A. Tapering to the width of the bucket at the north, which was $4\frac{1}{2}$ feet.

Q. And was the actual recovery of that gold under your personal [69] supervision, or under the supervision of Mr. Crone?

A. It was under my personal supervision.

Q. And did you have access to the sluice box—— were you the only one who had access to the sluice box, or did others have? A. Others had.

Q. And was any gold shipped to the United States Mint?

A. Yes; there was three cleanups, three different shipments.

Q. And was the shipment to the United States Mint and the recovery under your personal supervision, or was that handled by one of your associates?

A. Well, I could explain it. I sent it down there to the plant, and it was taken over to the Mint by Mr. Somerby.

(Testimony of William Harlan Morrison.)

Q. Now, at the time that the Government became interested in this property for the purpose of obtaining gravel, was that plant still in operation?

A. No; we had shut it down to make some changes.

Q. And what had become of that plant at, let us say, in 1939?

A. 1939? Floods took it out and distributed it all over the river.

Q. It wasn't then in working order at the time when the Government became interested in this from the gravel standpoint?

A. That is correct.

Q. Now, when this cut you have described was opened, did you, yourself, make any examination of the gravel in the vicinity of that cut for the purpose of determining its gold content?

A. Many pan tests were made. We weren't getting from the plant what the tests indicated we should get. In other words, it was very bad management. And to prove it, I put a test pit in the center of that cut down to bedrock.

Q. How deep did that pit go from the bottom of the cut to bedrock? [70]

A. I haven't the log here. I will have to do some figuring. (Referring to memorandum book.)

Q. Let me withdraw that question. Did you prepare a log on that hole as you went in?

A. I did.

Q. What were the dimensions of that hole?

(Testimony of William Harlan Morrison.)

A. The working dimensions were four by four feet.

Q. Is this document which I hand you, Mr. Morrison, the log to which you referred (exhibiting document to the witness)? A. This is.

Q. Now, can you step to the blackboard, Mr. Morrison, and place an "X" on that board that would approximate the position where that test pit was sunk?

A. (Witness marks on blackboard.) About in that position, possibly a little closer to this channel, but it has changed—the flood waters racing through there has changed it. I would say that is about right.

Q. Now, we will mark that cross "M-1," designating the position of the test pit (marking on blackboard). Now, will you describe just what you did in the way of making tests of the gravel removed from this pit, as you sunk the pit from the bottom of the cut to the bedrock?

A. Well, in the beginning we selected $2\frac{1}{2}$ —I will take that back— $4\frac{1}{2}$ cubic foot samples. The size of the bucket was measured, and our samples ran $4\frac{1}{2}$ cubic feet, and the computations were based upon that figure.

Q. And what, if anything, did you do with the gold that was recovered from that test?

A. Preserved it in bottles.

Q. Do you know where those bottles are now?

A. I wish I did. They were presented in evi-

(Testimony of William Harlan Morrison.)
dence in court in Auburn and lost by the Property Custodian there.

Q. You haven't seen them since they were offered in evidence in [71] Auburn?

A. I haven't seen them since they were offered in evidence in Auburn.

Q. Now, this proceeding in Auburn at which they were offered in evidence was the trial of the case of American River Gold Mining Company against O'Connor and others?

A. That is correct.

Q. And that was in the Superior Court of Placer County?

A. Superior Court of Placer County.

Q. Now, can you, Mr. Morrison, from that log, and from any other records which you made at the time, testify as to what gold content you found in the gravel that was removed from that pit?

A. Yes.

Mr. McMillan: Well, may it please your Honor, I object to that upon the ground that the proper foundation has not been laid. The manner of making this test, and the integrity thereof, and its competency, have not been shown—his competency has not been completely established—or may I state this: Should I reserve that objection for a motion to strike at the conclusion of his testimony and my cross examination of the witness?

Mr. Cornish: I will withdraw the question, your Honor.

(Testimony of William Harlan Morrison.)

Q. Mr. Morrison, what experience have you had in testing gravels?

A. Well, I should say a great deal. It is a little difficult to describe to those unfamiliar with the process, but I used a cleanup table of my own design, which recovers, I think, all, or nearly all, of the values; sufficiently accurately to bet you money on the mining operation.

Q. Under this process was there anything in this process that you used that would add gold that wasn't there before?

A. Not unless one wants to fool himself. I don't believe I ever did that.

Mr. McMillan: May I have that answer? [72]

The Court: Yes.

The Witness: I say, not unless one wants to fool himself. You don't add gold to the test if you are testing with the idea of investing your own money. That is what I meant to answer.

Mr. Cornish: Q. What was the purpose of making this test, Mr. Morrison?

A. With a view of putting a dredger in there of the proper capacity, and working the property as it should be done.

Q. For whose information was this test made?

A. Myself and my partners'.

Q. When did you make this test?

A. The test was completed September 10th. We had a great deal of trouble with water——

Q. September 10th of what year?

A. September 10, 1934.

(Testimony of William Harlan Morrison.)

Q. And at that time, at the time you made this test, had the Government made any overtures to you to obtain gravel from this property?

A. None whatever at that time.

Q. And did you have any litigation in mind at the time this test was made?

A. None whatever. Merely a question of investing our money.

Q. Now then, will you describe to the Court the process that you used for taking out this gravel, measuring it, and recovering the gold from the measured samples?

A. Well, we first provided the timbers and the lagging—we had to lag it very tight, because the ground is loose; it is in a constant state of flex, with gravel below the water line. And we lagged it as tightly as we could, driving the lagging ahead——

The Court: Speak a little louder, please.

A. (continuing) We lagged it as tightly as possible in there to help control the water, put two by six and two by eight laggings, whatever was on the job at the time—we had a great deal of [73] lumber and used whatever was convenient—and drove the lagging ahead in order to keep the water out as much as possible; took all the material out, and at different levels took measured samples, which was put over this cleanup table I referred to, the gold was recovered by mercury—that is, the small portions from the black sand which was impossible to pan out closely enough—we took it out

(Testimony of William Harlan Morrison.)

by mercury, cleaned it, measured the samples, and made our records.

Mr. Cornish: Q. Now, will you describe, Mr. Morrison, the position in this test pit from which you took each sample, and what your sample established was the gold content per yard of that gravel?

A. The first sample was taken at the top——

Mr. McMillan: May it please your Honor,——

A. (continuing) ——from $4\frac{1}{2}$ cubic feet——

Mr. Cornish: Just a moment.

Mr. McMillan: That is all right. I will reserve my objection for a motion to strike.

Mr. Cornish: Q. Go ahead, Mr. Morrison.

A. The first sample was taken at the top; from $4\frac{1}{2}$ cubic feet of material, we recovered 62/100 of a pennyweight of gold. We made our estimates on the basis of \$31.00 an ounce, or \$1.55 per pennyweight.

Q. And that showed what gold content?

A. 40/100 of a pennyweight, and a value of 62 cents.

Q. 62 cents per cubic yard?

A. Cubic yard.

Q. Going from the top of that hole, Mr. Morrison, down to the second test you made, what did that indicate?

A. My log was prepared on this basis: The distances from the bedrock. No. 2 sample, five feet off the bedrock produced 80/100 of a pennyweight.

Q. That would be how much per cubic yard?

A. Value, \$1.24 per cubic yard.

(Testimony of William Harlan Morrison.)

Q. And the third sample, Mr. Morrison?

A. No. 3 sample, four feet off the bedrock, 93/100 of a pennyweight, value \$1.44 per cubic yard.

Q. And the fourth sample, Mr. Morrison?

A. No. 4 sample, one foot off the bedrock, 2.40 pennyweights of gold, value \$3.72 per pennyweight—per ton—not ton—cubic yard.

Q. Cubic yard?

A. Cubic yard. I will take that back.

Q. Your fifth sample, Mr. Morrison?

A. The fifth sample was cleaned up from the bedrock, a measured sample off the bedrock produced 3.37 pennyweights of gold, a value of \$5.22 per cubic yard.

Q. And what did you say again, Mr. Morrison, was the value per cubic yard of the third sample?

A. Third sample, 93/100.

Q. And that was how much per cubic yard?

A. Per cubic yard, \$1.44.

Q. On the log here, Mr. Morrison, is the figure, "One pennyweight; value \$1.55."

A. I realize that. I took that from memory, because my notes weren't the same as the log. You can throw that one out if you like.

Mr. Cornish: We offer this log in evidence, if the Court please, and ask that it be marked defendants' exhibit.

The Court: Admitted.

(The log referred to was received in evidence and marked Defendants' Exhibit A.)

(Testimony of William Harlan Morrison.)

Mr. Cornish: Q. Now, Mr. Morrison, turning your attention to a shaft to the east of the cabin that is on the property, did you make any examination of the gold content of the gravel in and about that shaft? A. I did. [75]

Q. And at what time was that examination made, Mr. Morrison?

A. That shaft was completely caved, and I reopened it in the summer of 1937.

Q. And what work did you do after reopening that shaft?

A. We timbered it up about six by six inside measurement, six feet by six feet. We made no attempt to test that gravel until we reached the bedrock?

Sample No. 1, —

Q. Now, before you testify to the samples, Mr. Morrison, after you got the pit opened, did you do any other work on the bedrock or underground?

A. Yes; we cut a sump 2½ feet into the bedrock to let water accumulate while we worked.

Q. Did you have any other operations——

A. Started a cross-cut or drift to the east.

Q. How far did you run that drift?

A. 56 feet.

Q. That 56 feet would be under the bank?

A. Under the bank.

Q. Did you drift in any other direction, other than the east?

A. In 1939 I ran a 10-foot—or about 12-foot,

(Testimony of William Harlan Morrison.)

I should say, drift to the north from the bottom of the same shaft.

Q. Now, you made some tests of the gold contents of the gravel that you found in the bottom of this pit and in the two drifts? A. We did.

Q. And at the time that those tests were made had any overtures been made by the United States for the acquisition of that gravel?

A. 1939—1937—I think we were talking in the office about erecting the plant and doing such things as that at various times, but no overtures had really been made.

Q. Well, at the time that you made any tests of the gold content of that gravel had a condemnation proceeding been started? In [76] other words, did you make your test, Mr. Morrison, before or after October, 1939?

A. Yes. This test was made in the summer; perhaps August.

Q. August of 1939? A. 1937.

Q. And that would be two years before the condemnation proceeding?

A. Oh, yes, two years before the condemnation proceeding.

Q. And what was your purpose in making those tests?

A. A combination of assessment work, and to satisfy myself how far the values were under the bank.

Q. And what did you find in reference to the continuation of values under the bank?

(Testimony of William Harlan Morrison.)

A. The entire 56 feet carries values.

Q. And how does it compare in composition as to sand and rock and the general geological formation, as compared with the rest of the bar?

A. Precisely the same as the bar.

Q. The same material?

A. Precisely the same.

Q. Now, what samples, if any, Mr. Morrison, did you make in that tunnel, in that shaft, and in that drift, and what values, if any, did you recover?

A. Four samples were taken in the drift, one in the north drift, and I have a sixth sample in the combination, which was cleaned up in the bed-rock—crevicing around.

Q. Now, what did you do, Mr. Morrison, with the gold which you recovered from those samples?

A. Preserved in bottles, and later estimated its value.

Q. And do you still have those bottles?

A. Yes, I brought them with me this morning. I believe you have them there.

Q. Now, this gold which is in these bottles, Mr. Morrison, did any portion of that come from any course other than in this shaft [77] and these drifts?

A. None whatever.

Q. Nothing was added to your samples in ascertaining the gold content?

A. None whatever. I may add that some of those samples are not complete now, because they have been shown a great many times, and some of the weights may not come up to the original weight.

(Testimony of William Harlan Morrison.)

Q. I will show you a small bottle marked No. 1, "2½"—? A. Pennyweights.

Q. (continuing) —pennyweights," and ask you if you can identify this sample?

A. That is the measured sample, a yard of material, from the tunnel, right after the first timbers were set, at the start of the tunnel.

Q. That would be how far?

Mr. McMillan: May I inquire of counsel, is he contending that the Government was going to take gravel under this hill?

Mr. Cornish: I don't know what the Government was going to take, Mr. McMillan. The Government has never limited itself. All I know is the Government had 40 acres——

Mr. McMillan: Your contention is that the Government was intending to take this gravel and material from under the hill?

Mr. Cornish: I don't know, Mr. McMillan. I tried a long time to find out where the Government was going to take it, and they never told me.

Q. That was taken, Mr. Morrison, how far from the shaft?

A. Well, just under the bank, where the first timbers were set.

Q. That would be at the face?

A. At the face of the tunnel, or edge of the shaft.

Q. And what did a measured yard of that material show as to gold contents?

A. 2½ pennyweights of gold. [78]

(Testimony of William Harlan Morrison.)

Q. And the contents of this bottle is the gold to which you refer? A. Precisely.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibits next in order.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit B.)

Mr. Cornish: Q. Now, I show you another bottle, Mr. Morrison, marked No. 2 drift, 1.40 d.

A. That is pennyweight.

Q. And ask you if you can identify this?

A. That was taken two feet into the tunnel. 1.40 pennyweights, a value of \$2.17 per cubic yard.

Q. And that was taken from a measured yard, was it? A. Measured yard of material.

Q. I notice, Mr. Morrison, that the bulk of this sample is flaked, with the exception of one nugget.

A. That is correct. One nugget was in a little crevice, where it had not had the bouncing of the gravels washing over it.

Mr. Cornish: We offer this in evidence and ask that it be marked Defendants' Exhibit next in order.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit C.)

Mr. Cornish: Q. I will show you a third bottle, Mr. Morrison, marked "No. 3 drift, 2.60 d., 10"—?

(Testimony of William Harlan Morrison.)

A. Ten feet in the drift.

Q. (continuing) —“10 feet in the drift,” and ask you if you can identify that sample?

A. Yes, indeed.

Q. And what is that, Mr. Morrison?

A. That is gold, 70/100 [79] of a pennyweight.

Q. Now, Mr. Morrison, I call your attention to the difference in the appearance of the gold in Sample No. 2 and Sample No. 3, and ask you if you can explain the difference in the color?

A. That is the natural color, this dark color. When it comes out of the ground it has that color. The other sample we cleaned with nitric acid to remove every trace of mercury before weighing.

Q. And this Sample No. 3 has not been cleaned?

A. Has not been cleaned, that is correct.

Mr. Cornish: We offer, your Honor, this Sample No. 3 in evidence, and ask that it be marked Defendants' Exhibit D.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit D.)

Mr. Cornish: Q. Now, Mr. Morrison, would you testify again to the number of pennyweights of this sample, No. 3?

A. No, 3, 2.60, a value of \$4.03 per cubic yard.

Q. You testified a moment ago 7/10 of a pennyweight. Was that correct? A. No; 2.60.

Q. 2.60? A. Yes.

(Testimony of William Harlan Morrison.)

Q. I will show you a bottle marked No. 4, 15 feet in, 70/100.

A. 70/100. That would be 7/10.

Mr. McMillan: Mr. Cornish, may I inquire, are we still under the hill now?

Mr. Cornish: Yes.

The Witness: Not really under a hill; just a bank, where the cabin is.

Mr. Cornish: Q. This is taken at a point 15 feet east of the shaft? A. 15 feet.

Q. Behind the cabin?

A. Where the shaft goes down. [80]

Q. And what did that sample show as to value?

A. 70/100 pennyweight, 7/10, a value of \$1.08 per cubic yard.

Q. How much?

A. \$1.08, plus or minus. I didn't carry out these fractions.

Mr. Cornish: We offer this sample, No. 4, in evidence, and ask that it be marked Defendants' Exhibit E.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit E.)

Mr. Cornish: Q. Now I show you, Mr. Morrison, a fifth bottle, marked "No. 5, 1.20 d.," and ask you if you can identify that sample?

A. That is No. 5; came from the north drift, where we did our assessment work.

Q. And when was that removed?

A. Just one moment. That was the summer of

(Testimony of William Harlan Morrison.)

1938, I believe, the assessment work in the summer of 1938.

Q. And that showed what content per cubic yard, Mr. Morrison?

A. 1.20 pennyweights, value \$1.86.

Mr. Cornish: I offer that in evidence, if the Court please, and ask it be marked Defendants' Exhibit F.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit F.)

The Witness: I find a note here that was 1939, instead of 1938.

Mr. Cornish: Q. In 1939?

A. 1939.

Q. I show you another bottle, marked "No. 6," marked "Assessment, June, 1939, No. 6, 2.20 pennyweights."

A. That is correct. This was cleaned off the bedrock from that point [81] forward. We had never cleaned up the bedrock, and this was the result of it.

Q. That was in the north drift, or in the east drift? A. In the east drift.

Q. And Sample No. 6 was cleaned up in 1939 off the bedrock in the east drift?

A. That is correct.

Q. And that represented what volume of gravel?

A. That was never measured. It was just cleaned up and panned.

(Testimony of William Harlan Morrison.)

Q. Was it more or less than a cubic yard?

A. Very much less.

Q. Less than a cubic yard?

A. Less than a cubic yard, yes.

Q. From the bedrock in that drift of a volume less than a cubic yard you recovered 2.2 pennyweights? A. That is correct.

Q. And that would be, Mr. Morrison, out of a cubic yard—that is, assuming this had come from a cubic yard of material—would be what value per cubic yard?

A. I think I figured that—I am not sure—2.2 pennyweights—\$1.55. If His Honor will bear with me a moment, I can give it to you. (Computing on paper) \$3.25½.

Mr. McMillan: Q. What was that figure?

A. \$3.25½, if it were a yard.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibit G.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit G.)

Mr. Cornish: Q. Now, Mr. Morrison, in the examinations that you have made on that property, did you find that the gold is all of the flake variety that is in these bottles, or did you find——

A. No; there are some quite heavy pieces of gold. There is one [82] in the box there, wrapped with a piece of newspaper.

(Testimony of William Harlan Morrison.)

Q. I show you a piece of what appears to be yellow metal. A. That is gold.

Q. And ask you if you can identify that?

A. Very nice gold, I should say. I saw it taken from the bedrock on the claim at the lower end.

Q. This was taken from the 40 acres that is in question in this proceeding?

A. That is correct.

Q. And from the bedrock in what locality, Mr. Morrison?

A. Where the line starts into the river, right on the bend, the bedrock——

Q. That would be, then, down approximately at this point, where the river crosses the property (indicating)?

A. That is correct, right at that point.

Q. At the extreme south end of the gravel bar on the inside of the bend of the river.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibit H.

The Court: Admitted.

(The newspaper-wrapped gold nugget referred to was received in evidence and marked Defendants' Exhibit H.)

Mr. Cornish: I can give you the box and you can put it in the box.

The Clerk: It is easily lost. Thank you.

Mr. Cornish: Q. Mr. Morrison, you and Mr. Miedel and Mr. Somerby applied for a patent on this ground? A. That is correct.

(Testimony of William Harlan Morrison.)

Q. And prior to the application for the patent it is true, is it not, that you and Mr. Somerby and Mr. Fisher assigned your interest in the property to Mr. Miedel? [83]

A. That is correct.

Q. And the application for the patent then was made in the names of Fred O'Connor, Stella O'Connor, his wife, and Mr. Miedel?

A. That is correct.

Q. Now, did you examine the papers, the application for the patent and the other papers in connection with the patent?

A. Not certainly, no.

Q. Did you know from what source the information as to the gold content in that bar to justify the application for a patent was derived?

A. That came——

Mr. McMillan: May it please your Honor, that is incompetent; and the proper foundation has not been laid; and it is self-serving; and it calls for hearsay evidence.

The Court: The objection is sustained.

Mr. Cornish: May I state to the Court the purpose of my question? It is necessary, in filing for a mineral patent, to show that you have made a substantial recovery of gold, and I wish, by this line of questioning, to establish that these figures to which the witness has just testified, were the figures that were put into the application for the patent, which application was subsequently granted. Now, if counsel objects to that——

Mr. McMillan: May it please the Court, it is

(Testimony of William Harlan Morrison.)
entirely irrelevant. A person may file for a patent and make these claims, and then afterwards an investigation is made by the Department—even after the patent is issued; even after that the Government may seek to bring an action for the cancellation of the patent. The information you wish to call His Honor's attention to is within His Honor's knowledge. It is the requirement in order to obtain a patent. I object on the ground it is [84] irrelevant and incompetent.

The Court: Let the ruling stand. Proceed.

Mr. Cornish: Q. Do you recall, Mr. Morrison, during the spring, or the late winter of—between 1939 and 1940, representatives of Contractor Pollock coming down onto this property?

A. Yes, I do.

Q. And with whom did you deal?

Mr. McMillan: I object to that question, may it please your Honor,—a representative of Mr. Pollock—upon the ground that it assumes a fact not yet established. It is a loaded question, containing an assumption not yet established.

The Court: The objection is sustained.

Mr. Cornish: Q. Did you have a conversation, Mr. Morrison, in the early part of the year 1940, with a Mr. Hoops? A. I did.

Q. And at that time where was that conversation held, Mr. Morrison?

A. On the property.

Q. Did Mr. Hoops at that time exhibit to you a

(Testimony of William Harlan Morrison.)

document purporting to be a copy of an order of this Court? A. That is right; he did.

Q. And what conversation ensued, Mr. Morrison, concerning that document?

Mr. McMillan: I object to that, may it please your Honor, upon the ground the proper foundation has not been laid; not in any way binding on the Government; it is *res inter alios acta*, transactions had, so far as we are concerned, with a stranger. We don't know who the person is, —

The Court: The objection is sustained.

Mr. McMillan (continuing): —what his capacity was, or how he could bind the Government.

Mr. Cornish: Q. At that time, Mr. Morrison, what, if any, claim did Mr. Hoops make as to the right to go onto the property?

Mr. McMillan: That is objected to, may it please your Honor, upon similar grounds.

The Court: The same ruling.

Mr. Cornish: If the Court please, there is on file in this proceeding an original order made by this Court granting the Government possession of this property, and it is the purpose of this question to show—Mr. McMillan has stated, in his opening statement, that Mr. Pollock is the contractor who took over the contract on this land, and it was abandoned because of the landslide—and the purpose of the questioning is to show, your Honor, that Mr. Pollock came onto this property, and claimed under this order to have possession. It is

(Testimony of William Harlan Morrison.)

not to bind the Government on anything, other than to show their contractor claimed possession.

Mr. McMillan: Then, in that respect, may it please your Honor, he hasn't laid the foundation as to who this person was. I repeat that up to this moment it is *inter alios acta*, any conversation had with other persons. He should first establish who these persons were, and their authority.

Mr. Cornish: Q. Who was this Mr. Hoops, Mr. Morrison?

A. He represented himself as Mr. Pollock's superintendent on the job.

Mr. McMillan: Now, I object to that, may it please your Honor, and ask that it be stricken out.

The Court: Sustained.

Mr. Cornish: Q. Did you see this man Hoops on any other occasions? A. Many times.

Q. And what was he doing when you saw him on other occasions? [86]

A. Directing the work of the contractors.

Mr. McMillan: May I have that answer?

The Court: Yes.

(Record read by the reporter.)

The Witness: Directing the work of the contractors, the Pollock Company.

Mr. Cornish: Q. As a matter of fact, you know he was one of Mr. Pollock's foremen on the job?

A. I since learned that he was, after I had seen him there.

Mr. McMillan: I ask that his testimony be

(Testimony of William Harlan Morrison.)

stricken out, because it is obvious now he didn't learn until afterwards he was connected with Mr. Pollock, who was the contractor.

The Court: Yes. The motion is granted.

Mr. Cornish: Q. When did you first learn Mr. Hoops was Mr. Pollock's foreman?

A. When he displayed this document and told me—

Mr. McMillan: Now, may it please your Honor, counsel is not only asking leading questions, but he is asking loaded questions. He assumes, in his questions, some facts, some testimony that must be first established. "When did you first learn" he was his foreman? He hasn't yet established, in that connection, that Mr. Pollock at this particular time was the contractor for the Government.

Mr. Cornish: Mr. McMillan, do you contend that Mr. Pollock wasn't the contractor for the Government?

Mr. McMillan: If you will give me the date I will tell you whether or not he was, at that time, contractor for the Government.

Mr. Cornish: In January, 1940.

Mr. McMillan: He was. [87]

Mr. Cornish: He was the contractor?

Mr. McMillan: He was the contractor in so far as the construction of this Ruck-a-Chucky Dam is concerned.

Mr. Cornish: And in October, 1939?

Mr. McMillan: Yes.

Mr. Cornish: He was the contractor?

(Testimony of William Harlan Morrison.)

Mr. McMillan: Yes.

The Court: The Court will recess until two o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [88]

Wednesday, November 17, 1943

2:00 o'Clock p. m.

The Clerk: United States versus 40.34 acres of land.

The Court: Proceed, gentlemen.

WILLIAM HARLAN MORRISON,

Recalled for the Defendants; previously sworn.

Direct Examination (resumed)

Mr. Cornish: Q. Mr. Morrison, at the time that you had this conversation with Mr. Hoops on the property involved, and he showed you a copy of the Court order, did you, in that conversation, discuss anything other than the Court order?

A. Oh, yes. I asked him why they were tearing the place up.

Q. Did you at that time discuss arrangements to be made between yourself and Mr. Pollock for both of you having access to the property?

Mr. McMillan: May it please the Court, may I ask counsel to fix the time, the place, the persons present, and the circumstances?

(Testimony of William Harlan Morrison.)

The Court: Yes.

Mr. Cornish: Q. What is the closest you can fix the date of this first conversation when Mr. Hoops showed you this Court order, with reference to the time that the suit was filed?

A. It was immediately after the suit was filed.

Q. That would be in the latter part of October, then, of 1939?

A. I presume so, although my memory is faulty on that. But it was immediately after the suit was filed.

Q. At that time—at the time that you talked to Mr. Hoops, had the contractor already been on the property? A. Absolutely.

Q. Had the contractor at that time done anything to the property, [89] or made any change in the property.

A. Yes. He cut a path up, and was erecting a power line, and he stripped branches off of trees, and cut other trees down, and had poles for power and wire.

Q. At or about the time you had this conversation with Mr. Hoops, did you take some photographs of the property? A. I did.

(Whereupon Mr. Cornish handed several photographs to Mr. McMillan.)

Mr. McMillan: May it please the Court, may I ask counsel if this is intended to show the extent of the possession that the Government had taken at that time?

Mr. Cornish: It is not intended to show the

(Testimony of William Harlan Morrison.)
extent. It is to show that the Government's contractor had come on the property. The photographs do not show the full extent to which the contractor came on the property, but they do show that the contractor was on the property at that time.

The Court: You may proceed.

Mr. Cornish: Q. I will refer to this photograph as Defendants' Exhibit I for identification, and I will ask you if you can identify that photograph (handing photograph to the witness)?

A. Yes. This is one of the photographs I took at the time.

Q. I call your attention, in that photograph, to what appear to be oil drums at the left-hand side of the picture, right behind the automobile. Do you know who put them there? I will withdraw that. Do you know who owned them?

A. I don't know precisely who owned them. I presume the oil company owned them. But they were brought on there by the contractor.

Mr. McMillan: I move to strike the answer upon the ground that it is not responsive. [90]

The Court: The answer will be stricken.

Mr. Cornish: Q. Do you know who brought those oil drums on the property?

A. They were brought there by Mr. Pollock. They were brought there by the contractor under Mr. Hoop's supervision.

Q. In the background of that picture, I will call your attention to some lumber, and I will ask you if you know who brought that lumber on the property?

(Testimony of William Harlan Morrison.)

A. I do not know who brought this pile of lumber (indicating on photograph), but this (indicating) is scrap lumber that was on the property.

Q. The lumber on the right-hand side of the picture is scrap lumber which was on the property?

A. Yes, sir.

Q. That was on the property?

A. Yes, sir.

Q. The lumber on the left-hand side of the property you did not bring on the property?

A. No, sir. My reason for asking him the question about why they were tearing the property up, is that I had that tree posted—

Q. I call your attention also, Mr. Morrison, to a tree that is on the right center of the picture, on which there is a sign. Can you read that sign that appears in the photograph (handing photograph to the witness)?

A. It would be a little difficult to read it, but I know what that sign said.

Q. What did that sign say?

A. It said, "No Trespassing," and gave my name and address.

Q. At the time you were on the property immediately prior to, or immediately before this picture was taken, what was the appearance of that tree with reference to the way that it appears in this photograph (indicating on photograph)?

A. It was a leafed tree in front of my cabin.

Q. Was there foliage on it?

A. There was foliage on it. [91]

(Testimony of William Harlan Morrison.)

Q. Did that tree, at the time you took that picture, appear as it does in the photograph?

A. Yes, sir.

Q. Do you know who cut that tree that way?

A. One of the employees of the contractor.

Q. That is, one of Mr. Pollock's men?

A. Yes, sir.

Q. At the time you took this photograph were there any wires connected to that pole line (indicating)?

A. The cross-arms were there, and there was wire on the property.

Q. Was a wire connected up to that cross-arm on the tree?

A. There were two lines on it, yes.

Q. Was it afterwards connected up?

A. Yes, sir.

Q. By whom was it connected?

A. By the contractor.

Mr. Cornish: We ask that this photograph, which has been marked Defendants' Exhibit I for identification, be received in evidence.

The Court: Admitted.

The Clerk: Defendants' Exhibit I.

(The photograph referred to was received in evidence and marked Defendants' Exhibit I.)

Mr. Cornish: Q. Now, I show you another photograph, Mr. Morrison, and ask you if you can testify as to the time when that photograph was taken (handing photograph to the witness), which you are now holding?

(Testimony of William Harlan Morrison.)

A. It was taken the same day.

Q. On what portion of the property was that taken?

A. This (indicating on photograph) is north. Perhaps just about opposite the original pit which I testified to.

Q. That would be at the northern end of the bar, near the point marked "M-1" on the blackboard, or marked "M" on the blackboard?

A. Not quite that far. Halfway between the "X" and the bank.

Q. Calling your attention to what was apparently another tree, [92] with short branches sticking out on it, and beneath which appears to be a pole (indicating). Can you identify that object?

A. That was a tree that had been in full bloom and was denuded to make a power pole.

Q. By whom was it denuded?

A. Also by the contractor.

Q. And also the tree on the left side of the photograph?

A. That had been cut down.

Q. That had been cut down by whom?

A. By the contractor.

Mr. Cornish: The photograph to which the witness has just been testifying, has been marked or referred to as Defendants' Exhibit J. I now offer in evidence this photograph marked Defendants' Exhibit J for identification, concerning which the witness has just testified.

The Court: Admitted.

The Clerk: Defendants' Exhibit J.

(The photograph referred to was received

(Testimony of William Harlan Morrison.)

in evidence and marked Defendants' Exhibit J.)

Mr. Cornish: Q. I will show you another photograph, Mr. Morrison, and I will ask you if you can testify at what time that photograph was taken, and what it represents (handing photograph to the witness)?

A. That photograph was taken on the same day. It shows a view of the cabin, and also shows the first pole made out of a tree, to which I testified, this photograph showing the cross-arm on it.

Q. That would be taken from what point on the bar, and looking in what direction?

A. Looking south through the avenue that had been stripped of trees to make room for the power line.

Q. That would be in about what position on the blackboard.

A. Standing just opposite the arrow where "Bank" is marked there, and looking south. [93]

Q. I call your attention to an object that looks like a pole with a cross-arm on it, and I will ask you if you can identify that object (indicating on photograph)?

A. That is the cross-arm on the tree. That is not visible in one of the other pictures.

Mr. Cornish: We now offer in evidence this picture which has been marked Defendants' Exhibit K for identification, and concerning which the witness has testified.

The Court: Admitted.

(Testimony of William Harlan Morrison.)

The Clerk: Defendants' Exhibit K.

(The photograph referred to was received in evidence and marked Defendants' Exhibit K.)

Mr. Cornish: Q. Now I show you another photograph, Mr. Morrison (handing photograph to the witness), and ask you if you can testify when that photograph was taken?

A. At the same time. It is looking across the river.

Q. That would be taken in approximately about what position that is shown on the black-board?

A. Standing about where "X" is marked there, and running diagonally across the river, looking generally towards the northwest.

Q. There is an object which appears there rather faintly and indistinctly on the right-hand side of the photograph. Can you identify that?

A. That is a tree that had been denuded to carry the power line.

Q. And that had been denuded by the contractor? A. Yes, sir.

Q. I call your attention also to a cross-arm at the top of that tree (indicating on photograph).

A. Yes, sir. That was placed there by the contractor.

Q. In this photograph, I call your attention to a small white object in the lower right center of that photograph, and I will ask you if you can identify that (indicating on photograph)? [94]

A. That is a post or marker at one of the pits which tested the gravel.

Q. That was one of how many pits?

A. Five, If I remember correctly.

Q. Do you know by whom those pits had been dug?

A. The United States Engineers, I was informed when they were being dug. That was done there prior to the denuding of the trees.

Mr. McMillan: May it please the Court, may I ask how much prior?

Mr. Cornish: I will stipulate that that was done before the condemnation suit was started.

We offer in evidence this photograph, concerning which the witness has testified, and ask that it be marked Defendants' Exhibit L.

The Court: Admitted.

The Clerk: Defendants' Exhibit L.

(The photograph referred to was received in evidence and marked Defendants' Exhibit L.)

Mr. Cornish: Q. Now, Mr. Morrison, after you talked to Mr. Hoops, and he showed you the Court order, did you and Mr. Hoops discuss the matter of the two of you having access to the property?

Mr. McMillan: I object to that, may it please the Court, until the proper foundation has been laid. There is no testimony yet which indicates who Mr. Hoops is, and how he would bind the Government. It is a conversation between strangers.

The Court: Objection sustained.

Mr. Cornish: The testimony has shown that Mr.

(Testimony of William Harlan Morrison.)

Hoops was foreman for Mr. Pollock. That was testified to before lunch.

Mr. McMillan: Suppose he was the foreman for Mr. Pollock, your Honor? Still he could in no way bind the Government in this [95] matter.

Mr. Cornish: May it please the Court, the Government condemned this property for the purpose of permitting the contractor, as the Government's agent, to go in there and use the property. It seems to me that if the Government turned this property over to the contractor pursuant to the performance of the contract, for the construction of this dam, that whatever arrangements the contractor made with Mr. Morrison are certainly binding upon the property, because, after all, it was anticipated from the very beginning, not that the Government would take this gravel, but the contractor would take this gravel and use it—use the aggregates in building the dam.

The Court: The Court will withdraw its ruling. The objection is overruled.

Mr. Cornish: Q. Will you relate the conversation you had with Mr. Hoops regarding the two of you having access to that property?

The Witness: May I use the language that was used at that time?

The Court: I don't know what kind of language was used.

The Witness: It was not profane. It was a little heated, though, in fact.

A. I asked him by what strange notion he came

(Testimony of William Harlan Morrison.)

on there to tear up our property, and he patted his coat pocket and said, if I remember correctly—and I think I do—"I represent your Uncle Samuel." That was his language. "I have here an order which permits me to do it, and to do these things."

And I asked when he had received it, and he said he had received it the day before.

"Well," I said, "I have no desire to stand in your way. What [96] can I do to cooperate? I have brought my family up here. We have a house, or a cabin, that we live in from time to time, and" I said, "do you have any objection to that?"

And he said, "No, not at all, except that we feel that we must lock the gate on the road. We are storing powder in kegs in the tunnel."

So we agreed at that time that we would keep the gate locked, and he was to have a key, and I was to have one, and he was to be very careful who he presented that key to.

Mr. Cornish: Q. And from that time you and Mr. Hoops had the key to that gate?

A. That is right.

Q. And except for Mr. Hoops and yourself, no one else had access to that property?

A. That is true.

Q. At that time was anything said about the removal of the cabin?

A. Yes. He told me he wanted to put the plant right where my cabin stood. There was some question of moving it, and he thought the easiest way

(Testimony of William Harlan Morrison.)

would be to set fire to it. That was a joke, of course.

Q. Mr. Morrison, over how long a period prior to the commencement of this matter did negotiations with the United States Engineers concerning this property continue?

A. More than a year, I should say.

Q. And who represented your interests and Mr. Miedel's interests, and Mr. Somerby's interests, and Mr. O'Connor's interests? In other words, who took your part in those negotiations?

A. Yourself.

Q. Anyone else? Were you present at some of them?

A. I was present at nearly all conferences, yes.

Q. How about Mr. Miedel?

A. Mr. Miedel came to most of them, too. [97]

Q. Where were these conferences held, Mr. Morrison?

A. In Judge Hjelm's office.

Q. Were they all held in Judge Hjelm's office?

A. Except visits which I made to the United States Engineers' Office several months prior to the conferences.

Q. You had made some previous visits to the United States Engineers' Office?

A. That is true.

Q. And later conferences were held in Mr. Hjelm's office?

A. That is correct.

Q. And who, besides Mr. Hjelm, was present, representing the United States?

(Testimony of William Harlan Morrison.)

A. Major—my goodness, I can't think of his name now!

Q. Was Mr. Stanley present?

A. Mr. Stanley was present at most of the conferences.

Q. How about Colonel Chambers?

A. Colonel Chambers was also present.

Q. In these conferences, was anything said by you, or anyone representing your interests, about the gold values that you claimed to be on this property?

A. Yes. There was a good deal of discussion on the matter.

Q. What was said in those conferences concerning your contention as to the gold values, and the location of the gold on the property that is involved in this suit?

A. My contention was that it should be limited in depth in order to protect our interests, and Mr. Stanley's reply was that he had no desire to limit the contractor on the depth or area, either, if I remember rightly, and I think I do.

Q. Do you recall what was said about the importance of the limitation of the contractor in the depth to which he would go?

Mr. McMillan: May it please the Court, I ask that the time [98] be fixed.

The Court: Yes.

Mr. Cornish: Q. Can you fix the time of these conferences, Mr. Morrison?

(Testimony of William Harlan Morrison.)

A. Yes. Some of them were nearly a year before the condemnation proceedings.

Q. Throughout the various conferences discussing the matter of the conditions under which this gravel would be taken, was substantially the same contention made at each conference?

A. Yes, sir; that is correct.

Q. What was said by you, or by someone representing you, in your presence, and in the presence of Mr. Hjelm and Mr. Stanley, concerning the importance and the reason why you desired the contractor to be limited as to the depth he would excavate on this bar?

A. We always thought and said at every appearance that the materials——

Mr. McMillan: We object to that, because we think it is conceded that there was no excavation of any gravel in this case.

Mr. Cornish: May I state, if it please your Honor, that the purpose of asking these questions is that counsel stated in his opening statement that he intends to show that the Government intended to upset only 100,000 yards of gravel on the property, and that the gravel which the contractor would take was not the gravel under the hill; it was not the gravel on the west side of the river; but was the gravel in this bar, and the surface gravels that were more accessible than the heavier gravels and the richer gravels down below. My object in this examination, your Honor, is to prove that prior to the filing of this condemnation suit the

(Testimony of William Harlan Morrison.)
defendants made every effort to acquaint the Government with their contentions that the substantial values lay in the lower portion of this bar; that there were two bars, one of which—— [99]

Mr. McMillan: I will withdraw the objection at this time, your Honor.

Mr. Cornish: Q. Will you state, Mr. Morrison, what was said by you and your representatives concerning the importance of limiting the contractor as to the lengths he would go?

A. Well, we at every opportunity stressed the fact that we did not want, if it wasn't necessary, the gravels in the lower levels taken, and the reply was—I think Mr. Stanley's words were that at no time would he agree that the contractor should be limited.

Q. In these conferences what was said by you and by those representing your interests,—and by “your interests” I mean those of yourself, and Mr. Somerby, and Mr. Miedel—concerning the mining of one bar, and permitting the Government to operate on the other bar?

A. We asked permission on several occasions to be allowed to work, because we had negotiations under way for an operation.

Q. And what was the reply of Mr. Hjelm and Mr. Stanley?

A. We were told that they didn't want us in the way.

Q. What, if anything, was said by yourself and those representing you, as to limiting the contractor

(Testimony of William Harlan Morrison.)

over that 40 acres, upon which he might remove his gravel?

A. Nothing but a refusal to do so. I don't remember the exact language, but they just would not limit the contractor.

Q. Was any request made to limit the contractor?
A. Yes, sir.

Q. What was said in that regard, Mr. Morrison, if you can remember?

A. "We don't intend to limit the contractor." I think they were the exact words.

Q. What was said by those who represented you, to Mr. Stanley and Mr. Hjelm in that regard?

A. As a matter of fact, there is [100] correspondence filed on the subject.

Q. Do you recall the conversations?

A. Yes. Many times, when the request was made, the answer was, "No, we don't want you in the way." That is as near as I can tell now.

Q. In those conversations was the volume of available gravel discussed?

A. Only in a general way. I believe one of the engineers said, "We find there is sufficient gravel for our purposes," but I don't believe the quantity was discussed.

Q. Was the necessity for the contractor having the whole 40 acres in order to have that amount of gravel discussed?
A. Yes, sir, it was.

Q. What was said in that regard?

A. They said they didn't want us in the way;

(Testimony of William Harlan Morrison.)

that we would be obstructing them. That was always the answer.

Q. State just what you and those representing you said to the Government in that regard, as to the quantity of gravel actually available, as compared to the amount that Mr. Stanley said he believed the contractor would require.

A. Well, I know in one conference in Judge Hjelm's office I asked why in the world, gentlemen, we could not proceed with our plans, and agree to keep out of the way, and they said no, it could not be done; it just could not be done. I do remember one conversation where the contention was made that it was necessary to change the roads around, and we would be in the way of the coming and going of trucks and equipment.

Q. At or about the time that the Government filed this suit, Mr. Morrison, in October of 1939, was there any marketability for the sale of this property, by yourself and your associates?

A. Yes. We had five different firms asking permission to lease it or buy it, and one, a local resident. [101]

Q. And there were those five different concerns that were attempting to negotiate a lease or a sale at or about the time that this condemnation proceeding was started?

A. Yes; both before and after.

Q. That was both before and after?

A. That is right.

Q. And what, if any, attempt was made by you

(Testimony of William Harlan Morrison.)

or your associates to accept any offers that were made for the sale or lease of the property?

A. None after the condemnation was started. I distinctly remember writing a letter to a Sacramento concern, stating that they were negotiating for that gravel, and we were not in a position to consider any kind of an offer at the time.

Q. Besides turning down the offers you had for the sale of the property?

A. No, not for the sale of the property.

Q. How about the leasing of the property?

A. We had a number of opportunities for those.

Q. Did you discuss those with any of the proposed lessees?

A. We talked about the gravel, but we always came back to the point that we were negotiating with the Government, and that we were unable to do anything because we didn't have the property to dispose of.

Q. Mr. Morrison, what experience have you had in testing gravels under water, or in a state of flux as a result of the permeation of water?

A. Only on this property, except one other case, and that was on the Tanana in Alaska. That was in a state of flux.

Q. Have you, in your experience in testing in gravels, had an opportunity to compare the results obtained by tests with churn drills and testing with pits?

A. Yes, sir; positively.

Q. Will you explain to the Court the difference you obtained, and the result, and why that result

(Testimony of William Harlan Morrison.)
was different in the case of a [102] churn drill test, than when you sink a pit?

A. When you sink a pit, and timber it, you take out every ounce of the material, and make a thorough and reliable test. And when you narrow it down to a churn drill, you run the drill up and down, and the gold is precipitated, and it goes down on the bedrock, and the water that is flowing over it carries it off, and it is never gotten in the drilling test.

Q. As to the gold content that would be disclosed by sinking a pit, and the gold content that would be disclosed by churn drilling, what would be the difference?

A. I should say you wouldn't get more than 10 or 15 per cent of the gold close to the water any place. If you get back in the bank, where there is no great amount of water, perhaps the test could be relied upon, but not where the test is made in the bar itself.

Q. What is the physical reaction that takes place in the ordinary process of panning or separation of gold from the other materials in placer?

A. Well, in my language, you keep it in a state of agitation, and the difference in the specific gravity of the different materials causes it to align itself in the pan, and the lighter material comes to the top and washes off.

Q. That is what takes place in the ordinary process? A. Yes.

Q. Does that same physical change in the prop-

(Testimony of William Harlan Morrison.)

erty take place with the operation of a churn drill, where it is agitated in the flux?

A. Very much so.

Q. In your opinion, Mr. Morrison, would a churn drill test show the presence of any gold over an area of any size?

A. Not in my opinion. I have been told——

Mr. McMillan: I object to that upon the ground that it is [103] hearsay and incompetent.

The Witness: I won't say it. I realize that.

A. (continuing) In my opinion, it is impossible to make an adequate test of that property with drill holes.

Mr. Cornish: Q. You are familiar with the specifications pertaining to the taking of gravel, as they appeared in the contract between Mr. Pollock and the United States Government?

A. I should say I am quite familiar with it, yes. I purchased that prospectus at that time.

Q. As a matter of fact, you examined those specifications and went over them with a view to constructing a plant to work in conjunction with the contractor's gravel plant?

A. That is true.

Q. And those provisions, Mr. Morrison, are substantially the same as the provisions that are set forth in the complaint, on pages 4, 4-A, and 4-B, with reference to the recovery of the gold by the owners?

A. Yes, with one or two important exceptions.

Q. Now, I call your attention, Mr. Morrison,

(Testimony of William Harlan Morrison.)

first, particularly to some of those specifications as they appear on page 4—and I will read now from the single-spaced portion of page 4 of the complaint (reading):

“The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard one-quarter inch screen, and a vertical drop of not more than eight feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen, said gold recovery devices to be furnished, installed, and operated by the [104] owner and, except as specifically indicated below, without cost to the United States of America.”

I call your attention, Mr. Morrison, to that paragraph. Was the matter of the elevation of that material and the vertical drop discussed in these conferences between yourself and the interests that you represented, and the United States?

A. Absolutely.

Q. And what, if anything, was said in those conferences concerning the 20-foot drop for material which would pass a standard one-quarter inch screen? A. I didn't get the question.

Q. What, if any thing, was said in those conferences concerning the vertical drop of 20 feet for material which would pass a standard one-quarter inch screen?

(Testimony of William Harlan Morrison.)

A. A great deal was said. Incidentally, the process was reversed——

Mr. McMillan: I move to strike the answer as not responsive.

The Court: The answer will be stricken.

Mr. Cornish: Q. Was the matter of the elevation of that material and the vertical drop discussed in these conferences between yourself and the interests that you represented, and the United States,—calling your attention particularly to that provision of the specifications which I read (reading):

“The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard one-quarter inch screen, and a vertical drop of not more than eight feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen,”——

A. Yes, it was. I said it was, absolutely. [105]

Q. And what was said in those conferences concerning the 20-foot drop for material which would pass a standard one-quarter inch screen, and a vertical drop of not more than 20 feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen?

A. That is what I was trying to tell you. That language is wrong there. The *modus operandi* is reversed; it is just the other way around.

(Testimony of William Harlan Morrison.)

Mr. McMillan: I move that the witness' answer be stricken upon the ground that it is not responsive.

The Court: The answer is stricken.

Mr. Cornish: Q. Was that subject discussed, that question of the vertical drop discussed?

A. Absolutely.

Q. What was said by you?

A. I contended that we needed that in order to pass the material over those devices by gravity.

Mr. McMillan: I move that that answer be stricken upon the ground that it is not responsive.

The Court: Stricken.

Mr. Cornish: Q. The question is, Mr. Morrison: What did you tell them?

A. I told them what I wanted. I told them I wanted 20 feet of drop for material which goes over that fineness, and eight feet would be sufficient for the quarter-inch. They garbled it. It was just reversed the way they made it.

Q. In other words, what you mean is that in the conference what was discussed was just the reverse of what they put in the specifications?

A. Absolutely.

Q. What is the reason for those drops that are specified?

A. In order to make the materials pass through your plant by gravity, so that you will not have to use power to elevate.

Q. Calling your attention to Paragraph A, at

(Testimony of William Harlan Morrison.)

the top of page 4-A of the complaint, I read the following (reading): [106]

“All material which will pass a standard one-inch screen to be segregated by the United States of America into two sizes, and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are to be as follows:

“(a) All material which will pass a standard one-quarter inch screen;

“(b) All material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen.”

Was the matter of the separation of those two sizes of gravel discussed in the conferences between yourself and the United States representatives?

A. Yes. I was asked why that was necessary and my reply was that the method of treatment for the fine was in jigs and Ainley bowls, which the larger stuff would go over the riffles.

Q. And what, if anything, was said by the United States, or those representing the United States, concerning the separation?

A. I think they agreed with me at that time that the——

Mr. McMillan: Just one moment.

May it please the Court, I move that that be stricken.

The Court: Stricken.

(Testimony of William Harlan Morrison.)

Mr. Cornish: Q. Just state what they said concerning those requirements?

A. They agreed to do so.

Q. They said they would do so?

A. Yes, indeed.

Q. Now, reading the next paragraph of those specifications, Mr. Morrison, being paragraph (b), at line 9, on page 4-A (reading):

“Sufficient water to be delivered by the United [107] States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.”

Was that discussed?

A. That was discussed.

Q. What, if anything, was said by you in those conferences concerning the requirement of 2,100 gallons of water per minute?

A. There was considerable conversation about it. In the beginning, the size of the plant that was to separate the gravel was too——

Mr. McMillan: May I ask that the answer go out as not responsive, may it please the Court?

The Court: Yes; it will go out.

The Witness: I scarcely know how to answer the question any other way.

Mr. Cornish: Q. Let me ask you this question: In connection with the gallonage of water per minute, was the rate of the removal of the gravel from the bar discussed? A. Positively.

Q. What was said at those conferences concerning the relation of the amount of gravel that would

(Testimony of William Harlan Morrison.)

be removed from the bar, or the rate of removal of gravel from the bar, as compared to the gallonage of water?

A. My request for the quantity of material to be handled per hour brought a response of 100 yards an hour, and I discussed the quantity of water at that time, and that was agreed to.

Q. In other words, this figure of 2,100 gallons of water per minute was based upon the removal of 100 yards of gravel per hour?

A. That is correct.

Q. Now, reading paragraph (c) (reading):

“Sufficient electrical energy to be delivered by the United States of America to the gold recovery [108] devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.”

What, if anything, was said at those conferences concerning the relation of the horsepower to operate the gold recovery devices, as compared with the rate at which the gravel would be removed from the bar?

A. The discussion was based upon 100 yards per hour, and that 20 horsepower would be more than adequate. We agreed on that.

Q. Now, calling your attention to paragraph (F), as it appears on page 4-A of the complaint, between lines 24 and 25 (reading):

“The owner to operate the gold recovery devices in such manner and at a rate that the prime purpose of the sand and gravel plant, i. e., the pro-

(Testimony of William Harlan Morrison.)
duction of cleaned, well graded sand and gravel, will not be retarded.”

What, if anything, was said at those conferences regarding that matter mentioned in the paragraph which I have just read, as compared to the rate of the removal of the gravel from the bar?

A. At that time there was much discussion on the amount and the quantity, and the quality of material to be brought to us. It was our contention that our plant must be adequate. In other words, I felt that the contractor and I had to work very carefully together, and I believe at that time the United States Engineers agreed with me that that was the proper thing. The exact words used escape me now. It has been a long time ago.

Q. Mr. Morrison, would a plant that operated with 2,100 gallons of water per minute, with an electrical energy of 20 horsepower of connected load, handle gravel in such a manner that the prime purpose of recovery of sand and gravel would not be impeded in the operation at a rate in excess of 100 yards per hour removal [109] from the plant?

A. Positively not. It would bury it hopelessly.

Q. Was there anything said, Mr. Morrison, in these conferences between yourself and the engineers, concerning the limitation of the contractor as to the amount or rate at which he would dig the gravel from the bar for refining?

A. Yes.

Q. What was said?

A. I think Mr. Stanley made the assertion that the contractor would be more or less under their

(Testimony of William Harlan Morrison.)

supervision, and would be required to limit his production to that point.

Q. Now, Mr. Morrison, for a stationary plant what, in your opinion, is the value to a miner of the digging of the gravel, the elevating of the gravel to the heights that I have just read, and the furnishing of the amount of water that I have just read, and the amount of electrical energy that I have just read,—what is the value of that service per cubic yard of gravel recovered?

A. A very minimum of 10 cents per cubic yard. The plant would have to be very efficient.

Q. Would that vary to any extent, Mr. Morrison, where a portable plant was used?

A. Yes, it would vary. Your costs would come down from three to five cents.

Q. Then it would have a value of five to seven cents per cubic yard?

A. That is correct.

Q. To have that work done for you, and that water furnished, on a portable plant?

A. That is correct.

Q. Now, is it possible, Mr. Morrison, to operate a portable plant in connection with a sand and gravel plant, the primary purpose of which was the recovery of clean sand and gravel, suitable for concrete aggregates?

A. It would be entirely possible, yes. If a plant were designed to work in conjunction with it. The contractor already had a plant with a capacity of 250 yards [110] per hour, and that was the thing that got us into trouble, because he insisted

(Testimony of William Harlan Morrison.)

that was the plant he was going to install there.

Q. In the recovery of the gold, or in carrying out the provisions of the contract that you and the engineers had discussed, was it possible for you to recover a substantial portion of the gold with the gallons of water per minute and the electrical energy per minute, or sufficient electrical energy to be delivered for efficient operation, and the vertical drop provided in conjunction with the handling of the gravel, with a plant of 250 yards capacity per hour?

A. Positively not, because the limitations were left out of the specifications.

Q. Then the limitations that you testified was discussed of 100 yards per hour was not placed in this contract?

A. That is correct.

Mr. McMillan: Are you contending that there was a contract reduced to writing?

Mr. Cornish: No.

Mr. McMillan: You are simply now attempting to show the negotiations between the parties?

Mr. Cornish: To show that there were negotiations; that certain materials and matters were discussed; and that because of the turn of events it was impossible for the defendant to meet these conditions, because the contractor was not limited by the Government as to the rate at which he could take sand and gravel and, consequently, it was impossible for the defendants to recover the gold and comply with the specifications, namely, that they should not impede the substantial recovery of

this plant. That at the time it was understood the parties contemplated the taking of 100 yards per hour, and it developed, after the contract was let, and after the suit was filed, that the contractor [111] intended to use a plant that produced 250 yards per hour, as distinguished from one that produced 100 yards per hour.

Mr. McMillan: But no plant was ever set up, was it?

Mr. Cornish: No, no plant was ever set up.

Q. You and your associates have been connected with this property how long, Mr. Morrison?

A. Ten years.

Q. And you are familiar with the location and the boundaries and the controls of the property?

A. Very much so.

Q. What acreage of the entire 40.34 acres, Mr. Morrison, is gold-bearing gravel?

A. Approximately 30 acres in both bars.

Q. Thirty acres? A. Yes.

Q. Is all of that 30 acres exposed gravel?

A. Oh, no; no. The channel of the river is gravel.

Q. That 30 acres includes the bed over which the water of the river flows? A. Yes.

Q. That is gravel, as well as the portion above the water? A. Yes.

Q. And that 30 acres includes that portion of the bar up above, which is under the hill?

A. That is not taken into consideration at all.

Q. In other words, that portion on which you

(Testimony of William Harlan Morrison.)

ran this drift of 56 feet in length is not included in that 30 acres? A. Not at all.

Q. What portion of your 30 acres, Mr. Morrison, is on the inside of the bend, and what portion is on the outside, or on the south end of the property?

A. I can only approximate, but I would say 20 to 21 acres in the large, or the east bar, and nine or ten acres on the west side.

Q. In your judgment, Mr. Morrison, was it possible to mine the bar on the south end of the property at the same time that gravel [112] operations were taking place on the inside of the bend?

A. With ease. It would be the proper place to work, in fact.

Q. Would such an operation have in any way interfered with the removal of concrete aggregates from the bar on the inside of the bend?

A. I don't think it could possibly interfere.

Mr. Cornish: You may cross examine.

Cross Examination

Mr. McMillan: Q. Mr. Morrison, during these negotiations, the quantity of gravel that it would be necessary to take in order to get the concrete for use in construction of the dam, what quantity was discussed?

A. From 70,000 to 100,000 yards, if I remember correctly.

Q. But never above that at any time?

A. Oh, yes, it was. Indefinite.

(Testimony of William Harlan Morrison.)

Q. Do I understand your testimony to be that there was never any discussion of a definite nature as to the required amount of concrete aggregates that would be required in the construction of the Ruck-a-Chucky Dam?

A. Did you understand that?

Q. What was your answer?

A. It was my understanding that it should.

Q. What was your understanding during these negotiations?

A. During these negotiations, the damsite was discussed, and the requirements were estimated roughly at 70,000 to 100,000 yards of concrete aggregates, and after that time the damsite was moved; I was not able to get anyone to give me an estimate——

Mr. McMillan: I move that that be stricken as not responsive.

The Court: It will be stricken.

Mr. McMillan: Q. Now, Mr. Morrison, I understood from you that after your application had been made for a patent in this case, you transferred your interest.

A. That is correct. [113]

Q. Did you transfer your interest after you had made the test with reference to the quantity of gold in that gravel?

A. No. That transfer was for the purpose of convenience in obtaining a patent and protecting the original locator.

Am I correct in answering the question in that

(Testimony of William Harlan Morrison.)

way? I have always had the management, but the legal part of it was transferred to Mr. Miedel and Mr. and Mrs. O'Connor for the purpose of obtaining the patent. Miedel and Associates are partners, who have the title to the property.

Q. Haven't you an interest in the property?

A. A lease only. The title stands in the name of R. J. Miedel and Mr. and Mrs. O'Connor.

Q. What is the duration of your lease on the property?

A. For the duration of the war, I suppose; it is indefinite.

Q. That lease was entered into when?

A. Long before the discussions with the engineers' office. I would have to go back to my notes to give you an accurate answer.

Q. Have you a written lease?

A. Yes, sir; there is a written lease.

Q. For what term, please?

A. A five-year term.

Q. Beginning when?

A. I should say sometime in 1935.

Q. That has expired, has it not—the term?

A. No, it has not. It has been extended by agreement.

Q. By written agreement?

A. I think counsel will bear me out on that. I think that has all been taken care of.

Q. Do you know whether it has or not?

A. Not positively.

(Testimony of William Harlan Morrison.)

Mr. Cornish: Mr. McMillan, the leases are all attached to the——

Mr. McMillan: I have the witness in hand now.

Mr. Cornish: I object to the question upon the ground that [113a] the written lease is the best evidence.

Mr. McMillan: I am trying to find out from this witness,—and not from Mr. Cornish—not only his interest in the property, but also his interest as a witness.

The Court: Overruled.

Mr. McMillan: Q. You say you have a written lease, which was extended. It was extended from what time? A. I don't remember.

Q. You said you thought it had not expired.

A. It has not expired.

Q. And you know the consideration for the lease. A. Yes, I do.

The Court: Q. Is it on file?

A. It is attached to these papers, somewhere.

Mr. McMillan: Q. What papers?

A. A copy of it is attached to our answer.

Mr. Cornish: All the lease defining the rights of the parties are attached to the answer and marked as exhibits.

Mr. McMillan: Q. When did you first become interested in this property, Mr. Morrison?

A. In 1932, before the road, or the bridge, was built.

Q. When did you first hear of the Ruck-a-Chucky project?

(Testimony of William Harlan Morrison.)

A. About a year prior to the conferences with the engineers.

Q. That would be about what time?

A. The Act was passed in 1935.

Q. You had never been advised of U. S. Rivers & Harbors Committee Document No. 50 prior to that time?

A. I think not; I think not. I may have known it sometime in May or June of that year, because there was some question about title at that time.

Q. Some question about what title?

A. Our title.

Q. In what regard?

A. Oh, a little matter of claim-jumping. [113b]

Q. Sir?

A. A little matter of claim-jumping. There was an adverse title suit along about that time.

Q. Claim-jumping when? A. In 1934.

Q. That property up there had been withdrawn from entry in 1928, had it not?

A. Technically, yes.

Q. And it was reopened when, for the location of mining claims?

A. I would say it was reopened sometime in the early part of 1934, or maybe in the latter part of 1938.

Q. Was it not in August, 1938?

A. Possibly.

Q. What interest did you have in that property at the time it was reopened for entry?

(Testimony of William Harlan Morrison.)

A. I had machinery on the ground and was working.

Q. You didn't expect at that time, as the situation stood, to be able to make an application for a patent, did you, before it had been reopened?

A. No.

Q. Who was interest with you in the property?

A. At that time one of the very men who are today interested, and the Crone brothers were, whom we later bought out.

Q. When did you first set up some machinery there for the purpose of mining that property?

A. Just prior to its restoration.

Q. What is that?

A. Just prior to restoration to the public domain.

The Court: Mr. McMillan, it is now recess time.

(Recess.) [113c]

The Court: You may proceed, gentlemen.

Mr. McMillan: Q. Now, Mr. Morrison, are you prepared to state that you didn't know of the contemplated construction of the Ruck-a-Chucky Dam prior to the Act of Congress of 1935, that there were discussions, and that there were public documents and surveys made by the State and the California Debris Commission, and House documents of Congress recommending that sites be put up there on the Upper Narrows and other places in California, in furtherance of hydraulic mining?

The Witness: May I have the question again?

The Court: The reporter will read the question.

(Question read by the reporter.)

(Testimony of William Harlan Morrison.)

A. No.

Mr. McMillan: Q. Never heard of any such thing? A. No.

Q. No one ever told you anything about it?

A. No. May I clarify it? I think you misunderstood my answer. I said I am not prepared to state I knew these things were going on, but—

Q. Did you have any definite information in respect to it?

A. Only that which appeared in the newspapers. I presume I did know what was going on in the newspapers.

Q. Yes. And it was thought that the dam would be put on the Middle Fork of the American River, the Ruck-a-Chucky Dam, is that correct?

A. Yes. I can tell you when I learned about it. When they started construction on the North Fork Dam. Now, if someone knows the date of that, that is when I learned about it.

Q. And the time you became interested in that property was in 1932?

A. 1932; that is correct.

Q. Then you pursued that interest until 1934, when mining machinery [114] came in there?

A. That is right.

Q. Did you purchase the machinery, or who purchased the machinery that went in there in 1934? A. My associates and I.

Q. What?

A. My associates and I, a partnership. May

(Testimony of William Harlan Morrison.)

I explain, your Honor? May I explain how we got in there?

The Court: Just answer the question.

Mr. McMillan: Q. That machinery cost you how much?

A. The original installation, perhaps eight or ten thousand dollars. I am not prepared to say now.

Q. Was the full extent of the use of that machinery, your mining, just what you testified to here today?

A. I don't know what you are referring to. I testified to——

Q. What use did you make of the machinery?

A. Set up a dragline.

Q. That is the only one you set up?

A. At that time.

Q. Or any other time, with that machinery?

A. Yes, we put in other work from time to time.

Q. What other work?

A. We have spent a great deal of money there——

Q. Did you do anything besides spending money?

A. Yes, indeed; a great deal. We did our assessment work. Yes, indeed.

Q. Did you make any tests on the property beyond the three tests you have testified to this morning? A. Yes, sir.

Q. With reference to time, when?

A. Each summer I spent time there.

(Testimony of William Harlan Morrison.)

Q. That was for the purpose of doing location work, wasn't it?

A. Not always, no; assessment work. Assessment work requires 10 feet of tunnel, 10 feet of shaft, or an equal amount of surface work. [115]

Q. Other than that drifting and shafting, the work that was done in furtherance of doing the assessment work, did you do any other work?

A. Oh, yes, indeed.

Q. What?

A. The north drift, the 56-foot tunnel, was an exploration tunnel to learn what happened to the bedrock, to see if it remained the same; we thought it might dip down and reveal a channel.

Q. And you aided in the preparation of the application for a patent in 1938, did you not?

A. I don't understand.

Q. The application was made in 1938 for a patent, I think it was, for this mining claim. Did you assist in the preparation of that application?

A. I don't recall for certain.

Q. You don't recall definitely?

A. I think I was asked some question.

Q. At that time you were interested in this claim? A. That is right.

Q. But you assigned your interest in it afterwards, is that true?

A. No—I am not prepared to tell you the date of the assignment, because, as I say, it was a matter of convenience——

Q. Did you assign your interest in this patent,

(Testimony of William Harlan Morrison.)

or your claim to this mining property, prior to the payment of the money to the Government on the application for the patent?

A. I am not sure. I don't really know that——

Q. Did you pay any portion of that money?

A. I don't really know when that money was paid.

Q. Well, that money was \$2.50 an acre, wasn't it?

A. Yes.

Q. And do you remember when the patent was issued?

A. No. It was after the condemnation suit.

Q. Yes. Now, during the course of these negotiations that started, [116] we will say more than a year before the condemnation suit was brought, during the course of your discussions and negotiations, oftentimes the question of title came up, did it not, in discussing these matters with Mr. Hjelm and others as to the title of this property, and the patent had not yet issued?

A. Yes, sir, that is right; there was some discussion regarding title.

Q. You didn't expect any money to be paid under these negotiations until the title matter had cleared up, did you?

A. No, nor at any time—

Q. Now, isn't this a fact, Mr. Morrison: that during all your negotiations with the Government—and I am prepared to say the same with reference to you folks—these negotiations were all being conducted in good faith, is that true?

(Testimony of William Harlan Morrison.)

A. Absolutely, as far as I am concerned.

Q. You said that after this complaint was filed, these specifications were then called to your attention, and you found they were drawn up in such a way that they were backwards——

A. Yes; they were just reversed.

Q. Isn't it a fact that is an exact copy of the specifications that were furnished in a letter by Mr. Cornish to the United States Attorney?

A. No; it was reversed. It may have been a typographical error, but it was reversed.

Q. Well, he furnished the specifications, did he not, to the United States Attorney, before the complaint was filed? A. Perhaps.

Q. Well, do you know?

A. I don't know.

Q. Let me ask you: You said you were talking to a representative of the contractor after this condemnation suit was brought.

A. That is right. [117]

Q. And you have introduced in evidence certain photographs that you took at that time.

A. That is right.

Q. Why were you concerned at that time about taking photographs?

A. If you were the manager of an enterprise, wouldn't you be——

Mr. McMillan: Just a moment.

I ask that that be stricken out as not responsive.

The Court: It will be stricken.

(Testimony of William Harlan Morrison.)

Mr. McMillan: Q. What caused you to take the photographs?

A. As the manager, I felt it my duty to do so.

Q. They were taken at that time, were they?

A. Absolutely.

Q. Did you ever do any mining on Sweetwater Creek up in El Dorado County? A. No.

Q. What was the character of your mining in El Dorado County? A. El Dorado County?

Q. Yes. Did you do any mining up there in El Dorado County?

A. Yes; on this property.

Q. On this property? A. Yes.

Q. Not on any other?

A. Not on any other.

Q. And the extent of your mining in Placer County is limited to this particular property?

A. Not Placer County, but El Dorado County.

Q. El Dorado and Placer County, isn't it?

A. There is a difference of opinion there. We believe it to be in El Dorado County.

Q. None of it in Placer County?

A. I wouldn't be prepared to argue it with you. I believe there may be a small corner in Placer County.

Q. How many years were you up in Alaska mining? A. Three years.

Q. What was the nature of your mining up there?

A. Gold mining, with the exception of one winter. [118]

Q. Let me ask you this: Were you actively en-

(Testimony of William Harlan Morrison.)

gaged in mining during this period you have testified to? A. Absolutely.

Q. What became of your jewelry business?

A. I wasn't in the jewelry business.

Q. You testified on your direct examination that you were in the jewelry business for 40 years. What happened to your jewelry business when you were——

A. I learned the trade when I was a youngster. I was in the jewelry business at various times, I said, for 40 years. I was an apprentice 40 years ago.

Q. At the time you were interested in this property we have here under consideration you were in the jewelry business?

A. Are you asking me a question?

Q. Yes. A. What was the question?

Q. Were you in business in 1934?

A. Yes, sir.

Q. Where? A. Berkeley.

Q. And you have continued in that business there continuously since, is that correct?

A. Precisely. I have two sons that take care of the business, and I can come and go as I like.

Q. It doesn't give you much time to do mining, does it?

A. It hasn't since the war. Before the war, yes.

Q. What mining have you done?

A. I have produced more chrome and magnesium than any man in America for the last war. It is a matter of record.

(Testimony of William Harlan Morrison.)

Q. I am talking about as connected with this property. I am holding myself to that as closely as I can.

A. Pardon me; I misunderstood you.

Q. You say you have done a great deal of chrome and magnesium and platinum mining?

A. Not platinum; molybdenum I said.

Q. Have you ever had any experience in platinum mining? [119]

A. Stream bed deposits, yes. That is all there is in this country.

Q. Is there a lot of black sand on this property?

A. Yes, quite a lot.

Q. You remember I called the Court's attention to an affidavit of yours, an affidavit in which you set forth there is 45,000,000 pounds of black sand up there?

A. I should like to see that. I think that is a typographical error, also.

Q. Of the value of \$1.00 a pound or more.

A. I should like to see that.

Q. I show you a copy of your affidavit which was filed in resistance to our motion to go on the property to make tests on there, on page 3 (exhibiting document to the witness and reading):

“In addition to said free gold, 1½ percent of the total deposit of gravel and sand on said real property is what is commonly called black sand; that said black sand contains platinum, irridium, and other valuable elements of the platinum group; that approximately 45,000,000 pounds of said black

(Testimony of William Harlan Morrison.)

sand is in said deposit, and said black sand has a value of \$1.00 a pound or more."

A. That is possible.

Q. Well, how did you arrive at that? What investigation did you make to arrive at that statement? It is not made on information or belief, but positively.

A. Much of our sampling revealed three percent of the total volume was black sand.

Q. Well, I mean the platinum and the chromium and the tungsten, and kindred minerals. How did you arrive at that?

A. In two ways.

Q. State them, please.

A. By determination, metallurgical determination, setting aside the various elements, precipitating [120] them, and learning what they consisted of, and then, by a firm in San Francisco who specializes in the purchasing and the working of that material,—

Q. Did you submit tests to them?

A. Positively.

Q. Did you not, some years ago, take a great quantity of black sand to the Selby Smelting Company to have tested?

A. Yes, sir.

Q. What was the result of those tests?

A. Do you know why?

Q. I am asking you what was the result of those tests?

A. You are speaking of a great quantity. Do you remember the quantity? It seems to me it was 900 pounds.

(Testimony of William Harlan Morrison.)

Q. What was the result of that test?

A. \$20.00.

Q. In other words, it wasn't enough to pay expenses, was it?

A. No; but that was a test. That was done to determine whether or not our recovery devices were doing their work, and——

Q. The most valuable thing you have in that property, in your opinion, would be the black sand?

A. Yes, at \$1.00 a pound.

Q. Yes. And 45,000,000 pounds you have up there?

A. No; that is an error.

Q. To what extent?

A. Perhaps one cipher.

Q. In other words, you maintain now that the value of that is \$4,500,000, and not \$45,000,000?

A. Something a great deal more reasonable.

Q. Well, do you contend that there is more gold up there than that?

A. Yes, if it is all recovered; yes.

Q. More than \$4,500,000?

A. If the black sand is \$1.00 a pound, obviously. Whether that market will stay or not I don't know.

Q. Mr. Morrison, you stated that there is about 30 acres there [121] of exposed gravel.

A. That is right.

Q. How many cubic yards would that be?

A. I must say to you that I employed a firm of engineers, Milborn Brothers, United States Min-

(Testimony of William Harlan Morrison.)

eral Surveyors. They surveyed the entire section for us at a cost of fourteen hundred odd dollars.

Q. Who is "us"? A. Milborn Brothers.

Q. No; "they surveyed it for us," you said. Who is "us"?

A. The same partnership, Miedel, R. J. Miedel, and associates.

Q. Milborn Brothers made the survey?

A. That is right.

Q. You never made the survey?

A. No; I caused it to be made under my supervision. I was there every moment of the time.

Q. And the result of that survey was what?

A. The result of that survey, when I asked to have the gravel surveyed, was a million, if my memory serves me, three hundred thousand yards.

Q. Now, as a result of your observations and your tests you have made on that property, what value do you place on that gravel up there, 1,300,000 cubic yards, a yard? What is the average value per cubic yard of that 1,300,000 cubic yards?

A. It would only be approximate, but it is much better than a dollar a yard.

Q. Much better than a dollar a yard?

A. Yes.

Q. Did you arrive at that valuation as a result of those tests to which you testified this morning on your direct examination? A. Yes.

Q. And upon that ground solely?

A. No; there have been other tests made there.

Q. I am speaking of tests made by yourself.

(Testimony of William Harlan Morrison.)

A. By myself, that is right.

Q. You have only made the tests to which you have testified in [122] this court this morning on your direct examination? A. Oh, no.

Q. On that property?

A. Oh, no; I have made many more tests on that. I have no notes on them any more, no log of the holes, or anything else, but I have done much more work than that.

Q. I understood you to testify awhile ago that sinking a shaft up there is better than using the drill method, drilling. A. That is correct.

Q. Because by sinking a shaft you can take out all of the material. A. That is right.

Q. Now, you sunk a shaft up there, did you?

A. Yes.

Q. I am referring to the one you testified to this morning. A. Two.

Q. Did you take out all of the material?

A. And placed it on the dump, yes.

Q. Sir?

A. Took it out and placed it on the dump and took a measured sample of the different levels, as I described.

Q. But you didn't test all of the material you took out, did you?

A. No. I didn't say I did. I wish you could see——

Q. But you did not? A. No.

Q. Now, in reference to that drag cut, when was that? That was when you had that machinery

(Testimony of William Harlan Morrison.)

in there? By the way, you lost that machinery, didn't you? A. Some of it.

Q. Most of it, didn't you? A storm came up there, and the water came up, and you lost most of that machinery, didn't you?

A. No; some we saved by getting it onto the bank ahead of time. We were a little late.

Q. Well, that is not always too safe up there to do, dredger mining, is that a fact?

A. No, that is not a fact.

Q. You can dredge up there all the year around?

A. Yes, all [123] through the year. In the winter time you can put your dredger against the bank.

Q. Have you had any experience in dredging with these things called doodle-bugs?

A. Sure. Bought one once upon a time.

Q. It is your opinion that you can, at any time of the year, safely take dredging machinery into that property?

A. That is my considerate opinion.

Q. It wouldn't be dangerous to go in there in the winter? A. No.

Q. Well, you lost your machinery.

A. Left it on the bar and lost it. I was mistaken. I didn't realize. Now, I have had the experience; it wouldn't happen again.

Q. Did you ever get any machinery after that?

A. Yes.

Q. To what extent did you get any machinery

(Testimony of William Harlan Morrison.)

after that and set it up in operation on the property?

A. Well, now, you say "after that." You mean after the——

Q. Loss of that machinery.

A. No, no serious attempt, because we had then entered into negotiations with the United States Engineers.

Q. When was that machinery lost?

A. I don't know the exact time; one of the highest storms.

Q. Well, that test that you made was in 1934, that dragline test, wasn't it?

A. That is right. It was lost subsequently, lost since that time.

Q. You never operated at all after that, did you?

A. I don't understand quite what you mean by operate.

Q. Did you ever operate any mining machinery up there after that? A. Yes.

Q. What was the extent and nature of that machinery? [124]

A. A mechanical pump to control the water.

Q. What was the cost of that?

A. Seven or eight hundred dollars.

Q. Who provided that machinery?

A. Myself.

Q. Entirely yourself. Did you lose it, too?

A. No.

(Testimony of William Harlan Morrison.)

Q. Did you ever recover any gold from this property and send it down to the Mint?

A. Yes, sir.

Q. What became of that gold that you sent down to the Mint?

A. Just what becomes of any other gold that you send down to the Mint.

Q. Have you got the reports on that?

A. No; that is in the office.

Q. What office?

A. R. J. Miedel and Associates.

Q. Well, it is quite important that you should have those tests when you are considering the valuation of that property up there, isn't it?

A. No, not at all.

Q. You didn't consider those reliable tests, did you?

A. Yes.

Q. Now, let me ask you this: Tell us just exactly what you did at the time that you cut that strip there, that cut. I think you took out 28,000 cubic yards, didn't you?

A. No.

Q. How much? What was the length and width of it?

A. Fan-shaped, approximately 300 feet long by 40 feet wide, the edges sloping in, because when you drag it out it caves. No attempt was made to measure it.

Q. No measurement whatever in yardage?

A. No testimony on it here; no report on it.

Q. Well, that is why I am trying to get the information, Mr. Morrison, because it was very

(Testimony of William Harlan Morrison.)

indefinite to me, and I am trying to clear it up now. You made no measurement of the yardage, did [125] you?

A. Perhaps I did at the time, but I preserved none of that.

Q. Kept none? A. No, sir.

Q. Well, on what did you base these reports that you had here this morning?

A. This is hand work below that cut. The log shows that, Mr. McMillan.

Q. But the log doesn't show the quantity of material that you took out, does it? A. Yes.

Q. The entire quantity of material?

A. They are all measured samples of $4\frac{1}{2}$ cubic feet and a cubic yard; every sample is measured.

Q. How long did that mining operation continue?

A. I didn't get the question. You mean the dragline plant?

Q. Yes.

A. That continued about three months.

Q. And these tests were made over that period of time?

A. No; these tests were made by myself. The dragline operation was when the Crones were in the organization.

Q. Now, let us take up the next tests. As I understand it, in the bottom of that cut you sunk a sump four by four cubic feet, is that correct?

A. That is correct.

Q. And you went down six feet, is that correct?

(Testimony of William Harlan Morrison.)

A. If I might refer to that log I could tell you accurately. Let's see; approximately six feet.

Q. That would be about 96 cubic feet, wouldn't it?
A. Perhaps.

Q. Huh?
A. Perhaps.

Q. All right. And you took five samples, according to your testimony?

A. That is right.

Q. That would be a cubic yardage of about 22½ feet, wouldn't it? These samples were in quantity of about 22½ cubic feet, [126] is that correct? Each sample, is that correct?

A. Each sample.

Q. Well, why didn't you sample all of it?

A. I was trying to get accurate figures on the measurement, and measuring them in a small bucket. We considered at that time, with those different levels, a 4½ cubic foot sample was sufficient.

Q. Didn't I understand from your testimony that you had a great deal of water trouble at that time?
A. That is correct.

Q. Well, isn't one of the great advantages of sinking a shaft that you keep the water out?

A. You keep it out with pumps, yes.

Q. Well, if you sink a shaft, and the water seeps in, and you have water trouble, by reason of specific gravity, the weight of the gold, the gold gets in there and it sinks to the bottom, doesn't it?

A. No.

Q. None of it gets in?

(Testimony of William Harlan Morrison.)

A. No, I wouldn't say none of it gets in.

Q. In other words, if you sink a shaft, and on account of water conditions leave that shaft open for an extensive period, no gold will come in from the outside?

A. This was not left for an extensive period.

Q. How long did you leave that shaft there?

A. Only overnight. It was running continuously, and I think the work took four or five days, maybe six days.

Q. You worked four or five days on the shaft?

A. That is right.

Q. And you took five samples?

A. Yes, sir.

Q. $4\frac{1}{2}$ cubic feet for each sample?

A. Yes, sir.

Q. And it was a cut four by four feet, is that correct? A. Yes.

Q. And you went down six feet?

A. That is right. [127]

Q. Why didn't you sample the rest of it?

A. I think I testified a moment ago I felt the $4\frac{1}{2}$ cubic foot sample was sufficient, and there was considerable labor involved in working on a small table——

Q. Well, you tested by taking samples at random, didn't you? A. No.

Q. Didn't you testify there was a drift that ran back under the hill 56 feet?

A. That is right.

Q. Didn't you start in and take a sample there

(Testimony of William Harlan Morrison.)

where you started the drift, and then go in for a distance and take a sample, and in one place in a crevice you found some gold in good quantity——

A. No; just one little nugget.

Q. Is it an extraordinary thing for a nugget to get under a boulder?

A. Not an extraordinary thing for a nugget to get under a boulder, no; that is what it would do.

Q. And that is what happens, isn't it? Among mining men that is not considered a fair test?

A. Is it?

Q. I am asking you. Among mining men that is not considered a fair test?

A. Yes, sir, it is a fair test.

Q. Isn't it considered a fairer test by mining men that when you are running a drift or shaft and you hit a sample that runs unnaturally higher than the rest to throw it out?

A. You certainly would not throw it out.

Q. It doesn't make any difference how hot it is, you throw it in with the rest and average them all up together?

A. What do you mean by "hot"?

Q. Well, you say you are a mining man. That is a common locution among mining men.

A. It depends on what one's instructions are. If you were mining for yourself, you would take all the gold you found there, and you would want to make the test to [128] satisfy yourself——

Q. Were you making the test to satisfy yourself, or were you making the test because—. As I

(Testimony of William Harlan Morrison.)

understand, there was some trouble up there, and you wanted to get at the bottom of it. What were you making the test for?

A. I repeat the testimony I uttered this morning: In order to justify the spending of my money as well as my associates' money, and I certainly wouldn't throw away a good nugget to knock the value down, nor would I include a thing I felt should not be included.

Q. Well, then, in fairness to your associates and to yourself you believed, then, that it would be proper that when a hot test showed up, an unusual one, and you found a nugget of gold behind a boulder or in a crevice, that that should be added up and divided up with the other tests made, is that true?

A. If you were seeking an average, I would say no.

Q. Now, tell us a little more about that drift under the hill, that tunnel that was under the hill. How deep did that go in there?

A. The distance?

Q. Yes. A. How deep down?

Q. Yes.

A. Well, when it goes into the bar it is 21 feet from the collar.

Q. And how wide?

A. At that time it was six by six.

Q. How far back did it extend into the hill?

A. 56 feet.

(Testimony of William Harlan Morrison.)

Q. And the entire distance under that hill is about a hundred feet, isn't it?

A. I don't understand what you mean.

Q. What is the distance under the hill?

A. To our line, you mean?

Q. Yes. A. It is 156 feet.

Q. Then there is a hundred feet more under the hill?

A. That is right, but the only samples I submitted are for the [129] first——

Q. How many samples did you take?

A. Five, four of which are in that drift extending over a distance of—let me see—15 feet, my theory being that is as far as it would be feasible for a dragline or bucket line scraper to go, and the rest, I was looking to see what happened to the bedrock, or whether we had a channel in there.

Q. You didn't take that test as determinative of whether or not to advise your associates to do thus and so, did you? A. This last test?

Q. Yes.

A. No. I think I testified that was assessment work.

Q. As a factor and an element in determining in your own mind as an expert the recoverable gold in the entire acreage, you threw that out, didn't you? A. Precisely.

Q. That cut no figure at all?

A. Well, the difference between 15 and 56 feet. The 15 feet is ground that can be dredged with a doodle-bug.

(Testimony of William Harlan Morrison.)

Q. Yes. And if you kept on mining under that hill, the hill would come down on you, wouldn't it?

A. There was no thought of mining in the hill. We only owned 156 feet of it.

Q. Anyone undertaking mining operations in that hill there would be in very grave danger of having the hill coming down on him, would he not?

A. It would depend on what kind of a miner he was.

Q. You wouldn't expect the United States Government, in taking concrete aggregates, to go under that hill, would you?

A. I haven't discussed that at all.

Q. Well, would you, in your judgment?

A. Oh, no, of course not. Of course not.

Q. Mr. Morrison, after 1934, when you lost that plant, why did [130] you abandon the mining of that property for so many years?

A. Never at any time was it abandoned.

Q. Well, did you set up equivalent mining operations after that?

A. Was it necessary? No.

Q. Just let it remain idle?

A. No, it didn't remain idle.

Q. You never leased it, did you?

A. No; had no intention of doing so.

Q. Did you ever make any effort to have it dredged on a royalty basis?

A. I purchased a dredger, but dropped the idea when we began these negotiations.

Q. Whom did you purchase a dredger from?

A. Through the Pan-American Dredging Com-

(Testimony of William Harlan Morrison.)

pany. It was a dredger which had just finished an operation over in the county.

Q. What did you pay for it?

A. I didn't pay for it.

Q. Oh, you didn't pay for it?

A. We had a contract to buy it, and when the negotiations were started we asked them to cancel the contract.

Q. Just when did you ask them to cancel the contract? A. I couldn't say that.

Q. Near what time?

A. I could ascertain that from correspondence, but I haven't it with me.

Q. About what time, as close as you can arrive at it?

A. I believe around April or May, 1939.

Q. Up to that time you had done nothing?

A. I don't understand why you persist so about doing nothing.

Q. I am talking about having set up machinery and having a going enterprise in the way of mining that property. You never did, did you?

A. I don't understand the question, Mr. Mc-Millan.

Q. Did you ever set up, after 1934 or 1935, any mining machinery, [131] and operate actively that property? A. Yes, yes.

Q. What was that? That \$900 investment?

A. Yes, that is one of them. Another was a small dragline, which was considered nothing in the world but a test to see whether the values ran

(Testimony of William Harlan Morrison.)

somewhat uniformly, and we ascertained that to our own satisfaction.

Q. What was the contract price on this dredger?

A. Twenty-eight thousand odd dollars.

Q. Forty-eight thousand?

The Reporter: Q. Did you say twenty-eight thousand or forty-eight thousand?

A. No; he is putting words in my mouth again. No; twenty-eight thousand.

Mr. McMillan: Q. Mr. Morrison, in your opinion is that the proper way to mine that property, to dredge it?

A. Precisely.

Q. Sir? A. Precisely.

Q. The most practicable? A. Precisely.

Q. The most logical? A. Yes.

Q. Then why didn't you do that long before?

A. (Witness laughs.)

Q. You had an investment of \$10,000, and you had other investments there. Now, at this late stage in 1939 you were prepared to get a dredger for \$28,000.

A. That is correct. None were available before that time at a price we felt justified to pay.

Q. The doodle-bug became popular about that time, 1934 or 1935, didn't it?

A. No, it was not practical until 1938, and that will be borne out——

Q. About that time, 1934 or 1935, there was a great deal of [132] excitement in the mining of gold on account of the price, \$31.00 an ounce?

(Testimony of William Harlan Morrison.)

A. That is correct.

Q. And about that time they started in with these doodle-bugs, and later on perfected them?

A. That is correct. They weren't considered a success until——

Q. Did the Government ever take any of the gravel on this property for use—— A. Yes.

Q. (continuing) ——in the construction of that dam?

A. I don't know for what use it was taken, but some was taken, and I have been told——

Q. I am asking you of your own knowledge.

A. Yes, I saw it leave.

Q. How much?

A. Oh, I don't know; several truckloads of gravel was taken. I think it was used for an abutment, but I didn't see it done.

Q. You don't know that? A. No.

Q. And you don't know how much was taken, but it couldn't be beyond that several truckloads?

A. No.

Q. Now, this machinery was never set up on the property to which you testified this morning that negotiations were going on for the setting up of, certain machinery for the recovery of gold? There was nothing set up, was there?

A. What?

Q. In your negotiations certain machinery was to be set up, certain gravel was to be fed into it, and you were to recover the gold and the tailings

(Testimony of William Harlan Morrison.)

given back to the Government. That was never done, was it?

A. No. Do you know why? Do you want me to tell you why?

Q. No. I am asking you if it was done.

A. No.

Q. Now, besides taking the gravel there, the Government did [133] exercise some use of that property in the way of putting in a road?

A. No road.

Q. But they did put a power line in there?

A. That is right.

Q. So they made some other use besides the contemplated use of also taking gravel and sand, is that correct? Why hesitate on that, Mr. Morrison? You were testifying a little while ago as to setting up some poles, power lines.

A. I see no sensible answer to your question. After having been excluded I have no notion what they did there.

Q. I understood from your testimony you testified, and you produced pictures in support of your testimony, that certain poles were put in there.

A. That is correct, and that was done prior to the condemnation suit.

Q. And nothing was ever done after the condemnation suit was filed, is that correct?

A. Oh, no, there was work done there.

Q. Do I understand from your testimony with reference to the pictures you have introduced in evidence, and also in reference to these power lines,

(Testimony of William Harlan Morrison.)

they were set up before the condemnation suit was brought?

A. Not in their entirety, but they started before the condemnation suit was filed.

Q. Will you tell us what took place after the condemnation suit?

A. I can't say to save my life.

Q. You don't know whether anything was done, do you?

A. Oh, yes, I know things were done——

Q. Your testimony as to what the Government did in connection with taking possession of that property had to do with all things that took place before the condemnation suit was filed, is that correct?

A. Wouldn't you say that things were done [134] after the——

Q. Mr. Morrison, I am asking you a very specific and clear question that is susceptible of an equally specific and clear answer.

(Question read by the reporter.)

Mr. McMillan: I will reframe the question.

A. Do that, please.

Q. For your better understanding. You introduced in evidence this morning certain photographs showing oil drums and trees that were stripped for the purpose of running power lines on them. Now, when were those pictures taken?

A. I think the testimony will show——

Q. Well, may I have your best recollection on it?

(Testimony of William Harlan Morrison.)

A. That was on the day of my conversation with Mr. Hoops.

Q. Was that subsequent to the filing of the condemnation suit, or before?

A. No, it was subsequent.

Q. The pictures were taken subsequent?

A. Yes.

Q. Now, did that condition which these pictures reflect exist prior to the filing of the condemnation suit? A. I am informed that it did.

Q. Then, what was done then was done before the condemnation suit was filed?

A. Without my knowledge and without permission.

Q. Sir?

A. Without my knowledge and without permission, under protest of the men I had on the property at that time.

Q. Then some person was a trespasser on that property? A. That is right.

Q. And not the United States Government?

A. That is right; your contractor, Mr. Pollock.

Q. But not the United States Government?

A. Well, a representative of the Government.

Q. Because you saw the poles and all this work depicted in the pictures before the suit was filed.

A. No, you misunderstood me.

Q. I thought that was what your testimony was.

A. I may have given you the wrong impression, unintentionally on my part. You wouldn't see the lines there on the trees in the pictures——

(Testimony of William Harlan Morrison.)

Q. That is true, but were they on there before the condemnation suit was filed?

A. I don't know.

Q. Will you testify they weren't put up there until after the condemnation suit was filed?

A. Perhaps that is correct.

Q. I am asking you if it is correct now or not.

A. I was informed they went in there with their materials before the condemnation suit was announced to us. What date it was, I couldn't tell you the date.

Q. You want your testimony to stand to that effect? A. I do.

Q. When was that gravel taken?

A. Subsequent to the condemnation suit.

Q. How long after?

A. Oh, several weeks, I imagine.

Q. Then the only thing that you know of your own knowledge that the Government did after the condemnation suit was filed in the way of taking possession was to take the gravel, is that correct?

A. Well, I am not sure, Mr. McMillan, that this is the right place to answer that question. I do know of many things that developed——

Q. When was that talk about setting fire to that house?

A. Oh, a week or two, perhaps, after the taking of possession.

Q. Well, it was never set afire, was it?

A. No.

Q. Who told you to set fire to it?

(Testimony of William Harlan Morrison.)

A. Nobody. [136]

Q. Was there some suggestion of burning it down?

A. That was Mr. Hoops' suggestion, that it would be the easiest way of getting rid of it.

Q. Do you think the Government would be bound by an act of that kind?

A. If performed by its agent, yes.

Q. Do you believe the Government is responsible for the wrongful acts of its agents?

A. After taking possession——

Q. I am just trying to get clear, Mr. Morrison, after those poles were erected, whether those trees were stripped, and whether the wires were laid, before the suit was filed?

A. Well, I frankly don't know.

Q. Name some of those persons—you said there were a number of persons that wanted to lease this gravel, or purchase this gravel from you. Who were those persons?

A. One, a man by the name of Stagg, who is the owner and operator of several dredging operations; he is one.

Q. When was that?

A. That was at the time it was under condemnation. Just when I couldn't say.

Q. After the condemnation suit was filed?

A. That is right. That is right. My reply to him was we were under condemnation and couldn't deliver title, and therefore we would have to discuss it some other time.

(Testimony of William Harlan Morrison.)

Q. Now, who else? Who else?

A. I am trying to think of his name.

Q. You said there were several.

A. He has an enormous dredger. He operates in Northern California. I will think of his name in a moment. Then there was a man brought to us by the Pan-American Dredging Company. His name I never did learn.

Q. When was that?

A. That was a year or more ago.

Q. Well, after the condemnation suit was filed?

A. That is [137] right. And prior to that there have been a number of negotiations. Mr. Taylor, who at that time was operating the Hines-Gilbert Mine.

Q. That was about when?

A. Oh, a year before the condemnation suit.

Q. Did you ever enter into a contract?

A. Naturally not. I planned to operate it myself. That is no crime.

Q. In disposing of that gravel you had always in mind, did you not, that it was gold-bearing?

A. Let me get the question. In disposing of it?

Q. Yes. If a man came to you to buy that gravel on that property up there, would you sell it as gravel, or as gold-bearing gravel?

A. If he permitted us to extract the gold, he could buy the gravel; otherwise not.

Q. As I understand, in your contracts you had with these persons, or these contracts you sought to have, or persons desired to get gravel from you,

(Testimony of William Harlan Morrison.)

that you had an understanding to that end, that is, the only way they could get the gravel was to permit you to get the gold?

A. That is correct.

Q. Was that your understanding with these prospective purchasers?

A. Prospective purchasers?

Q. I understood from your direct examination that you had a number of opportunities to sell that gravel, is that right?

A. I think you misunderstood me. People came to us wanting to buy it, and as I understand, a number of people wanted to lease it, and a number of people wanted to get a bond and option to buy on a royalty basis.

Q. On a royalty basis? A. Yes, sir.

Q. That, Mr. Morrison, wouldn't be a sale of gravel; that is a mining operation, isn't it?

A. Well, —

Q. Not a sale of gravel?

A. Did you understand me to say I [138] was selling gravel? We have all along maintained we are not in the gravel business.

Q. I am sorry to say that is my understanding of your response to the questions your counsel asked you. You have never had any gravel to sell to anyone, is that right?

A. We have sold a small amount of gravel, yes.

Q. How much?

A. I would say about 20 yards to one of the mines up there for concrete foundations.

(Testimony of William Harlan Morrison.)

Q. But you have no gravel for sale in large quantities? A. That is correct.

Q. Never had any for sale in large quantities?

A. I just testified we had some for sale if——

Q. But you wouldn't sell it——

A. Without removing the gold, no.

Q. Did you ever make any tests on that property of your own by drilling, drilling tests?

A. Not personally; not personally.

Q. Are you familiar with making tests in that manner? A. Absolutely.

Q. Do you know of any piece of property in your entire experience outside of Alaska of like quantity, gravel property that carries the gold content to which you have testified today with reference to this property?

A. I know of no other or I would own it.

Q. You don't own this, do you?

A. A share of it, yes.

Q. Sir? A. A share of it, yes.

Q. But do you know of any such property outside of this?

A. There are none left. They have all been dredged except this one. This one has never been dredged.

Q. Would you say this property has not been dredged or mined at any time?

A. I am in a position to prove that it has [139] not been dredged. It has been mined to a certain extent, but it has never been dredged.

(Testimony of William Harlan Morrison.)

Q. Are you in a position to prove that in the early days, in 1878, there was not on that Spanish Bar there, thousands of men carrying on mining operations?

A. Legend has it in the Gulch above, not on the Bar.

Q. Before that, in 1848 and 1849, isn't it a fact that the first million dollars ever taken off any mining operation was up in that country?

A. In that country, yes, but not on that property.

Q. Not on your property?

A. That is correct.

Q. Isn't it true that the Chinamen came after that, up there in that country, and worked over those bars in their thorough way?

A. That is correct.

Q. But no Chinaman ever mined on your property?

A. To some extent, yes.

Q. But that is the extent of the mining on your property?

A. That is right.

Q. And that is practically virgin gravel, then?

A. Much of it is, to my knowledge.

Q. None of it has been pillaged by any operations?

A. No, sir.

The Court: It is adjournment time. We will adjourn until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Thursday, November 18, 1943, at 10:00 o'clock a. m.) [140]

Thursday, November 18, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

The Court: You may proceed, gentlemen.

Mr. Cornish: You want to continue your cross examination of Mr. Morrison?

Mr. McMillan: No further cross examination.

Mr. Cornish: Mr. Morrison, will you take the stand, please?

WILLIAM HARLAN MORRISON,

recalled for the defendants; previously sworn.

Redirect Examination

Mr. Cornish: Q. Mr. Morrison, in Mr. McMillan's questions he asked you concerning any tests you had made on this property other than the two, the shaft and the drifts of which you testified. To what extent, if any, have you made tests to determine the gold-bearing content of the surface gravels of that bar? And I refer now to the bar on the inside, the El Dorado Bar.

A. Many pan tests, measured samples were carried down to the laboratory and worked on, to satisfy ourselves that we weren't spending our money needlessly or uselessly.

Q. And what did your tests of the surface gravels indicate as to the gold content?

(Testimony of William Harlan Morrison.)

A. You refer now to the surface gravels down to the clay seam, or——

Q. The panning test, just off the surface of the bar.

Mr. McMillan: Well, may it please your Honor, that calls for an opinion of the witness, and you must have better evidence.

Mr. Cornish: Withdraw the question. [141]

Q. And what did your panning tests of the gravels on the surface of the bar show as to gold content?

A. 25 to 35 cents a yard.

Q. 25 to 35 cents a yard?

A. But it must necessarily go that much or you couldn't see the sample; it wouldn't be enough to see——

Mr. McMillan: I ask that that be stricken out as a conclusion of the witness.

The Court: It may go out.

Mr. Cornish: Q. On each of these pan tests that you took of the surface gravels, after you had panned the gravel down to the concentrates you mean you were able to see gold?

A. Precisely.

Q. Free gold? A. That is right.

Q. Now, Mr. McMillan also asked you concerning the sale of gravel on that bar. Do you know what, if any, sales of gravel have been made in the last five years, of gravels from the El Dorado Bar?

A. Perhaps 20 yards. I didn't measure it myself, but a report from a man we had on the ground showed about 20 yards——

(Testimony of William Harlan Morrison.)

Mr. McMillan: Object to that as not the best evidence.

The Court: No, it is hearsay.

Mr. Cornish: Q. What price was paid, Mr. Morrison, for the sale of the gravel, and on what terms? A. \$2.00 per yard, cash.

Q. \$2.00 per yard. And you say that 20 yards was sold? A. Yes.

Mr. Cornish: That is all.

Recross Examination

Mr. McMillan: Q. When was this 20 yards sold, Mr. Morrison?

A. I am not sure that I could fix the exact date, because I haven't with me the report. It was just prior to the taking of [142] possession by the Government Engineers.

Q. To whom was it sold?

A. The Hines-Gilbert Company—not the Hines-Gilbert Company, the Slaggard Mining Company.

Q. For what purpose, Mr. Morrison?

A. I understand it was to be used as an engine foundation at the tunnel mouth.

Q. It was a small quantity of 20 yards, is that correct? A. That is my testimony.

Q. Easily transportable?

A. Well, if one carried it on his back it might—

Q. Do you know of any sales around that bar of 1,300,000 cubic yards, the amount that you estimate on that property? A. Not lately.

(Testimony of William Harlan Morrison.)

Q. Do you know of any pioneer acquisition of the property?

A. May I have that question again?

Q. Do you know of any sales at any time on that bar of 1,300,000 cubic yards of gravel, as gravel?

A. There has been no project requiring it——

Mr. McMillan: May I ask that that be stricken out and the witness instructed to answer the question?

The Court: Yes. Answer the question.

A. The answer is no.

Mr. McMillan: Q. In your opinion, could 1,300,000 cubic yards of gravel have any market for any person or any institution except someone like the United States of America, engaged in projects similar to the Ruck-a-Chucky Dam or the Shasta Dam?

A. Could a private party—let me see if I understand the question—could a private party use that much gravel?

Q. I am undertaking to ask the questions.

A. Well, I am trying to see if I understand the question.

The Court: The reporter will read the question. [143]

The Witness: Yes; will you please read the question?

(Question read by the reporter.)

A. It is true the Government is the biggest buyer of that class of material. I have in my brief

(Testimony of William Harlan Morrison.)

case now requests for bids from the United States Government, the Department of Reclamation, but we haven't bid recently.

Mr. McMillan: Q. Or the State of California?

A. The State of California, perhaps.

Q. Yes. Do you know of any private corporation or concern——

A. Not at this time.

Q. Well, at any time? A. Yes.

Q. That you have owned the property?

A. The power companies—the P. G. and E. have bought that much material at one time or another.

Q. For what purpose?

A. The erection of plants for power purposes.

Q. Where?

A. All over the State of California.

Q. I mean in the vicinity of this property.

A. The Calaveras Plant is in this vicinity——

Q. Well, that is a very large public utility, exercising the power of eminent domain.

A. That is right. That is the way I am trying to answer your question.

Q. That was a power project, wasn't it?

A. That is true.

Q. Do you know what the cost of that project was?

A. Not offhand, no.

Q. Now, you have made no further tests yourself except those to which you have testified?

A. That is true.

Q. One question I want to ask you, Mr. Morrison, before you leave the stand: Did I understand

(Testimony of William Harlan Morrison.)

you to say yesterday that of your own knowledge you know of some truckloads of gravel taken by this [144] contractor up to the dam in connection with the construction of it after this condemnation suit was filed? A. Yes.

Q. You know it was taken from this property, do you?

A. I saw it leave there, but I don't know where it went.

Q. You saw it leave there, but you don't know where it went? A. No.

Q. You do know that in Section 24 the Government had taken property there, also, do you not?

A. Yes.

Q. And that Mr. Pollock had a camp site there, did he not?

A. He did have a camp site up on the hill. Whether it was Section 24 I wouldn't be able to say.

Q. It wasn't on your property?

A. What?

Q. It wasn't on your property? A. No.

Q. He had trucks up there, didn't he?

A. Yes.

Q. And there was a gravel bar on the river up there, wasn't there? A. Not much of a bar.

Q. Not much of a bar. Well, sufficient for a couple of truckloads? A. Yes.

Q. And there was a road from that property to the proposed damsite, wasn't there?

A. Not at that time.

(Testimony of William Harlan Morrison.)

Q. When was it put in there?

A. I couldn't say exactly what date.

Q. Well, will you testify that that gravel was not taken from that small bar by Mr. Pollock?

A. No, because I didn't stay there and watch him.

Q. You will not testify it was taken from your property, now, will you?

A. Yes, I will testify there was two truckloads left our property with gravel. Where it went I don't know.

Q. That is, you saw two truckloads of gravel drive from your property, but you don't know from where it was taken, do you? [145]

A. Yes, I do know where it was taken from, because I was sitting in the cabin looking out.

Q. Then that was before the 10th day of October, 1939, wasn't it?

A. Is that the date you took possession?

Q. That is the date the complaint was filed.

A. No, it was after that.

Q. How long after that?

A. Oh, a week or ten days, perhaps.

Mr. McMillan: That is all.

Mr. Cornish: That is all.

(Witness excused.)

Mr. Cornish: Mr. Miedel, will you take the stand?

RUSSELL J. MIEDEL,

Called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Mr. Miedel, where do you live? A. I live in Piedmont, California.

Q. And in what business are you engaged?

A. I am engaged in the glass manufacturing business in Oakland, California.

Q. And with what concern are you connected?

A. The Hazel Atlas Glass Company.

Q. And what is your position with the Hazel Atlas Glass Company?

A. I am director of sales.

Q. How long have you been connected with the Hazel Atlas Glass Company?

A. Twenty-seven years.

Q. And you are one of the defendants, the defendant named as R. J. Miedel, in this action?

A. Yes.

Q. And associated with Mr. Morrison and Mr. Somerby in the attempts to mine or gain profit of some sort from this particular piece of property that is in question in this action? [146]

A. Yes.

Q. Now, when did you first become connected with this property, Mr. Miedel?

A. Well, we all started together—I can't give you the exact year—I think it was somewhere around 1932.

Q. 1932? A. That was my recollection.

(Testimony of Russell J. Miedel.)

Q. At that time was there any mining machinery on the property?

A. Yes. We made a deal with a man by the name of Texas Crone, I think his name was, who had a dragline, and my recollection was he had the dragline on that bar when we negotiated and went in there.

Q. When you say you went in there, what did you do in the way of going in?

A. Well, we put up money.

Q. And at the time that you put up the first money had you investigated the title of the property?

A. Yes, I think we did.

Q. Had you obtained a search of title by a title company when you put your first money up?

A. No.

Q. And for how long a period of time after you put up your first money did the Crones operate this property?

A. I would say offhand for a period of approximately two years.

Q. Two years. Now, during the time that the Crones operated the property approximately how much money did you and your associates invest in machinery alone?

A. I can't answer that question because I don't recall it. I would have to consult our records. We have records on it, but I can't say offhand.

Q. What money was put in in machinery, Mr. Miedel, had been—the machinery had been damaged and broken up by floods before the Govern-

(Testimony of Russell J. Miedel.)

ment became interested in condemning this property, had it not? A. That is right.

Q. And except for small bits of salvage lying around the bar, [147] like a bucket or tipped-over hoist, or something of that sort, you had no machinery in place? A. That is right.

Q. Now, Mr. Miedel, when did it first come to your attention that there was any question over the title of this property?

A. Do you mean when we heard that the Government was going to come in?

Q. No. That anyone else other than yourselves, the Crones and the O'Connors, claimed title to the property?

A. Well, our claims were jumped, I think it was in the year 1934, and we had a suit, at which time the judge decided in our favor, that our claims had been jumped.

Q. That was the case of American River Gold Mining Company against O'Connor and the rest of you that were interested, that was pending in the Superior Court of the State of California, in and for the County of Placer?

A. That is right.

Q. Do you recall the date that was decided in your favor?

A. No, I don't remember what the date was.

Q. Now, following the determination of that suit, did you invest any more money in mining machinery on the property? That is, you yourself? Any substantial sums?

(Testimony of Russell J. Miedel.)

A. No sizeable amount.

Q. What, if anything, did you do with the property following the determination of this case of the American River Gold Mining Company versus O'Connor?

A. Will you repeat that question, please?

(Question read by the reporter.)

A. The only thing we did, according to my recollection, is that we kept a watchman on the property to keep it from being jumped; did our assessment work.

Q. Did you do anything concerning the title of the property?

A. Well, we spent a considerable amount of money doing our [148] assessment work so we could get a patent from the Government.

Q. And an application was made to the Government for a patent, was it?

A. Yes, sir; and it was granted.

Q. Now, Mr. Miedel, at the time this application for a patent was made did Mr. Morrison and Mr. Somerby and Mr. Fisher retain any interest in the property?

A. Yes, they had an interest in the property.

Q. And what was their interest in the property?

A. Their interest in the property at that time, it is my recollection, was—they had, I think, 25 percent each.

Q. And was that in the property itself, or in the right to operate the property?

A. The right to operate the property.

(Testimony of Russell J. Miedel.)

Q. And with respect to the title of the property itself——

A. The patent was granted in the name of Fred and Stella O'Connor and myself.

Q. And at the time that the patent was applied for did Mr. Morrison or Mr. Somerby or Mr. Fisher have any interest in the title of the property, or had that previously been transferred?

A. That had been previously transferred. They didn't have any title in the property itself.

Q. To whom had that transfer been made?

A. To me.

Q. And as a result, the application for patent was made, and the patent was issued to yourself as a one-half owner, and to Mr. and Mrs. O'Connor as one-half owners?

A. That is right.

Q. Now, in respect to the time that this condemnation suit was filed, was that patent issued before or after the suit was filed?

A. The patent was issued before the condemnation suit was filed.

Q. Was it actually issued before, or was it applied for before?

A. It was applied for, I think, Mr. Cornish—I am not quite [149] sure.

Q. To refresh your recollection as to the date, it was issued August 28, 1940, was it not?

A. I think the condemnation suit was filed against us in November, wasn't it?

Q. The condemnation suit, Mr. Miedel, was filed in October, 1939.

A. 1939.

(Testimony of Russell J. Miedel.)

Q. Now, before this condemnation suit was filed, Mr. Miedel, you were present at a number of conferences in the office of Judge Hjelm, who was then United States Attorney?

A. Yes; we had many conferences with Judge Hjelm and representatives from the United States Engineers.

Q. That was, in particular, Mr. Stanley?

A. Yes, sir.

Q. Now, do you recall the first inquiry concerning the property, as far as its gravel value was concerned?

A. The first inquiry, I think, was in the year 1936 or 1937, at which time we had a talk with a major of engineers, who I think his name was Harrison—I am not positive about that name, but that is my recollection.

Q. Major Harrison, you say?

A. Harrison. And he raised the question as to what we considered the value of the gravel in the property to be. He was later transferred, and I think his place was taken by a man by the name of Colonel Chambers.

Q. Do you recall that during the month of February, 1939, a request was made by Colonel Chambers for you to submit a price at which you would sell certain gravel interests in the property?

A. What year was that, please?

Q. In February of 1939.

A. Yes. We had arrived at an understanding with Judge Hjelm—

(Testimony of Russell J. Miedel.)

Q. I refer now to before Judge Hjelm came into it. A. Oh, before? I am not sure. [150]

Q. To refresh your recollection, Mr. Miedel, I will show you a letter from the War Department, addressed to the office of Cornish & Cornish (exhibiting document to the witness).

A. Yes, that is right.

Mr. McMillan: Q. What is the date of that?

A. February 17, 1939.

Mr. Cornish: Q. Then it was on or about the 17th of February, 1939, that negotiations first opened for the sale of this gravel?

A. That is right.

Q. Now, in earlier conferences, Mr. Miedel, what approach did you make toward the determination of a price? Was it on a royalty basis, or was it on a flat sum basis?

A. My recollection is that we first offered this to the Government on a royalty basis, and we were told that they wanted an outright price.

Q. Were you told by them as to what they considered the gravel to be worth?

A. My recollection is they told us they considered gravel to be worth, in place, 10 cents per cubic yard.

Q. That was who made that statement?

A. My recollection is that statement was made by Mr. Stanley, the Government engineer.

Q. Mr. Stanley said he considered it worth about 10 cents a yard in place?

A. That is right.

(Testimony of Russell J. Miedel.)

Q. Now, in these conferences, Mr. Miedel, was the amount of gravel that the Government intended, or then thought they would take, discussed?

A. Yes; we had a number of discussions on that. First we wanted to hold the Government to a specific amount of gravel, and they didn't want a specific amount named, because it was quite possible, with the large-sized trucks that the contractor had to use, that a considerable amount of gravel would have to be used on a road, because they were going to use very large units, and they wanted a free hand to take any amount of [151] gravel they so desired.

Q. And was there anything said about the price you were willing to make on the gravel if the Government recovered the gold for you?

A. The matter, as I say, was handled by many conferences and many approaches, but in the final—one of the later conferences, we asked for \$20,000 for the right to take over the property and build sluice boxes and jigs to handle it from a stationary plant. Mr. Stanley did say then, representing the United States Engineers, they didn't want to go about \$10,000. We shaved our price to \$15,000, and Mr. Stanley didn't want to go any higher than ten, and I finally said to Judge Hjelm, "You set the price which you think is fair, and I will stand on it." He said, "We will split the difference; make it \$12,500." I said, "All right," and we shook hands and made the deal. You understand, in addition to that payment of \$12,500, the Govern-

(Testimony of Russell J. Miedel.)

ment was to do other things to assist us in mining the gold. They were to dig the gravel, lift it up 20 feet in the air, provide us with water, and provide us with power—all the things necessary to run it through the sluice boxes and the jigs. And when we extracted the gold they were to remove the tailings, and do many things which would be an expense on us if we were operating it; and the size of the gravel was to be an inch and an inch and a quarter.

Q. In addition to the payment of \$12,500, the Government was to dig the gravel, elevate the gravel to the height at which it would go through your concentrating devices by gravity, furnish water and furnish power, and remove the tailings, is that right?

A. That is right. You understand by that also, that the construction we had in mind was this: We were ready to mine this property. It meant an investment of somewhere between possibly [152] forty to fifty thousand dollars. On this deal the Government was doing it for us, so it wasn't necessary for us to make any capital expenditure.

Q. Now, Mr. Miedel before this condemnation suit was filed, and when the negotiations were pending, did you have an opportunity to purchase mining equipment to use on this property?

A. Yes, we could have purchased mining equipment.

Q. Are you familiar with the deal between Mr.

(Testimony of Russell J. Miedel.)

Morrison and the Pan-American Dredging Company for the purchase of a dredger?

A. Yes. He discussed this with me and I said it was O. K.

Q. You were going to put up the money?

A. Yes. I am financially able to finance that deal.

Q. And at that time you intended to do it had the Government not been intending to condemn the property?

A. That is true. And you also understand, Mr. Cornish, that the United States Government, through the RFC, were lending money to encourage mining in the State of California.

Q. Now, Mr. Miedel, after this deal was made, you have testified to involving the payment of \$12,500, was that deal completed?

A. After we shook hands on that deal in this building here with Judge Hjelm, a little bit later I was called back up and a conference was arranged with Colonel Chambers, Mr. Stanley, Mr. Hjelm, and I think one or two other engineers, at which time Colonel Chambers objected to the price, and he wanted to know if we wouldn't be willing to shave that price so that he could go along with it a hundred percent. We thought the matter over, and to terminate it we agreed to reduce the price, my recollection is, five percent, or somewhere around \$11,750. Then we thought the deal was completed and was going through as soon as Judge Hjelm could complete the title. He had gone back,

(Testimony of Russell J. Miedel.)

as I understand [153] it, to everybody who had filed on these claims to the year 1850, and he was making a title search, and he told me that as soon as he could complete this search, notwithstanding that we were getting the patent, that the deal would be completed. Then the bids for the contractor were published before our condemnation suit, and in it it carried the agreement which Judge Hjelm and I had agreed, as to what the contractor was to do to take the gravel, such as raising it 26 feet, supplying us with so much water and so much power, digging the gravel, and taking it away from the sluice boxes, and we assumed we had a deal, but as far as paying us any money or doing anything else, they have never done it.

Q. Do you know, Mr. Miedel, whether any overtures were made to obtain from the Government permission to mine a portion of this property while the gravel was being recovered?

A. Yes. In our talks with the engineers and Judge Hjelm, we asked permission to retain half of the bar so we could start mining, and my recollection is we also asked for another portion of the bar to start mining. In fact, that point was up a number of times, and each time we were told they didn't want us on the property. In other words, they wouldn't give us permission to mine any part which they would not use for their own use.

Q. And was there any discussion in these conferences, Mr. Miedel, concerning the depth that

(Testimony of Russell J. Miedel.)

the contractor would excavate in order to get this gravel?

A. Yes, that point was raised, and we wanted to have them agree that they would just take off the top, because we considered that the further down it went the richer the property became, and they said they didn't want any restrictions on them in any way; they wanted the property, and they were going to take as much gravel as they needed, and they were going to do it the way the contractor felt he wanted to do it. [154]

Q. And the only restrictions or concessions which the Government made are those written in the complaint, namely, the digging of the gravel, the elevation of the gravel, the removal of the tailings, and the furnishing of the water and the power?

A. That is correct.

Mr. Cornish: You may cross examine.

Cross Examination

Mr. McMillan: Q. Your name is Robert Miedel, isn't it?

A. Russell.

Q. Oh, Russell? A. Yes.

Q. Mr. Miedel, you have been in the glass manufacturing business? You are now, are you?

A. Yes, sir.

Q. Salesman for that large company, a well known company, which is over in Oakland, isn't it?

A. Yes, sir.

(Testimony of Russell J. Miedel.)

Q. How long have you been with that company?

A. Twenty-seven years.

Q. Well, the fact of the matter is, you don't profess to be a mining man, do you?

A. No, sir.

Q. And is this your only experience in a mining venture?

A. No, I have been in other mining ventures.

Q. Well, I mean in short, not to make this examination time-consuming, you have never had any education as a mining engineer?

A. No, sir.

Q. Or anything along that line; and you make no such profession?

A. That is right.

Q. You are a business man?

A. That is right.

Q. And, we know, a successful one. Now, I suppose you have taken up several mining ventures?

A. Yes, I have been in a number of mining ventures. I was born and raised in West Virginia, and I was in the coal mining business back there, and I own stock [155] in certain mining ventures here in California, and I have been in certain claim deals.

Q. Yes. And some of them panned out and some of them didn't?

A. That is right.

Q. On the whole, you fared pretty well, though, didn't you?

A. Yes.

Q. But some of them were a complete loss?

A. Yes, sir.

(Testimony of Russell J. Miedel.)

Q. In brief, persons knowing that you are well-to-do financially, interested in those matters, would seek you out and sell their ventures and themselves to you—that is about what it is—and you would invest in it?

A. If the thing had possibilities of profit, I am always interested.

Q. If they convince you of that?

A. I use my own judgment on that.

Q. And like many of us, it proves——

A. Sour.

Q. (continuing) ——unfortunate. Who first interested you in this project, this property?

A. Well, Mr. McMillan, I was approached by Mr. Fisher, who told me that this man Crone——

Q. Oh, I don't care—I don't think we need to go into all of that, Mr. Miedel. I mean about when did it come up?

A. Oh, around 1932, I would say.

Q. At that time the property had been withdrawn from entry by the Government, hadn't it?

A. I am not prepared to say about that. I don't know about that.

Q. You don't assume to know any of those technical phases? A. No, sir.

Q. Do you know when the property was reopened for entry? A. No, sir.

Q. When did you first go on the property and become interested in [156] working it?

A. I think, Mr. McMillan, as I testified, it was in 1932.

(Testimony of Russell J. Miedel.)

Q. Well, that was before the property had been reopened for entry?

A. I don't know about that.

Q. As a mining claim. Well, it was worked, then, during the period, then, when it was withdrawn for entry?

A. I can't answer that. You have to ask Mr. Morrison. He handled the details of that.

Q. When did you first meet Mr. Morrison in connection with this matter?

A. Well, I knew Mr. Morrison for a good many years.

Q. You knew him about that time?

A. Yes.

Q. And he came into this venture about when?

A. The same time I did.

Q. About 1932? A. Yes, sir.

Mr. Cornish: Mr. McMillan, do you want to enter into a stipulation as to the date that property was restored?

Mr. McMillan: Yes. It was August 28th, I think.

Mr. Cornish: Three months prior to August 28th.

Mr. McMillan: 1934.

Mr. Cornish: Three months prior to that there was an order made restoring the property to location, but preserving the period of three months prior to August 28th, up to August 28th—that would be a 90-day period—was reserved for location by veterans under the Homestead and Desert Lands laws.

(Testimony of Russell J. Miedel.)

Mr. McMillan: That is correct.

Mr. Cornish: In other words, there was this 90-day preferential period preceding August 28, 1934, but it was our contention in the proceeding in Auburn——

Mr. McMillan: I don't care for that—— [157]

Mr. Cornish (continuing): ——which was sustained by the Court——

Mr. McMillan: Just a moment.

May it please your Honor, I don't want anything else in that stipulation. He asked me for a stipulation——

Mr. Cornish: I think we will get along better, Mac, ——

Mr. McMillan: I know, but I am not stipulating to contentions of counsel at Auburn. He asked me if I would stipulate as to when it was reopened for entry, and I stipulated with him on that. Now, I am calling for this stipulation: Will he also stipulate this mining location was withdrawn from entry on June 8, 1928?

Mr. Cornish: If you say that is the date, I will stipulate, because I know, from my investigation at the time that these people went on the property, it was not subject to mining location, and I know that the earliest time that it was subject to a valid mining claim location was August 28, 1934.

Mr. McMillan: That is correct.

Mr. Cornish: Now, as I say, there was some question about whether a veteran could locate under the mining laws, and we took the position that they

(Testimony of Russell J. Miedel.)

could not, and the Superior Court in Auburn ruled that they could not, so I think the 28th of August, 1934, is the earliest date.

Mr. McMillan: Q. Now then, in view of the explanation that has just been made by your counsel, Mr. Miedel, you understand that during that period of 1932 that you have mentioned, up to August 28, 1934, that that property was not open for entry as a mining claim, except that three months prior to that it was open for veterans under homestead entry? Is that your understanding of it?

A. That is right, but as to the exact date we started [158] to mine on that, Mr. McMillan, I can't recall. You can ask Mr. Morrison; he can tell you.

Q. Well, what was Mr. Morrison's connection with this? Was he the man representing you that kind of took charge of this?

A. Mr. Morrison has been in charge of the operation of this property ever since we have had it.

Q. And has promoted it, hasn't he?

A. Promoted—well, I would say he has operated it. We haven't sold any stock.

Q. But you are the man that put up the money?

A. That is right.

Q. From start to finish. And you quit putting up money when?

A. I am still putting up money.

Q. I mean of any sizeable amount.

A. 1934.

(Testimony of Russell J. Miedel.)

Q. You purchased some machinery in 1934?

A. Yes.

Q. Was that before it was reopened for entry?

A. I couldn't answer that. I haven't the date——

Q. But you bought it?

A. Yes. I think I can give you the exact date by consulting the books, if you desire.

Q. No; that is satisfactory to me. You put money in to buy machinery, and the machinery was bought, and it was lost? A. That is right.

Q. Now, since that time you haven't put in any sizeable sum?

A. I would say I have been putting in sizeable sums; attorneys' fees, and watchmen—those all run into a large sum.

Q. Well, isn't that since it was open for entry?

A. Well, it is still going on.

Q. Take this date I mentioned here, August 28, 1934, did you put any money in after that, of any size?

A. Oh, I would say that our expenses since that time, if that was before we bought the machinery, has run into quite a few thousand dollars. [159]

Q. And after you bought the machinery?

A. We have had a constant expense, yes.

Q. Well, you had to do some work and have some expense in order to do your assessment work to prove up on the property?

A. That is right.

Q. And I take it for granted you are the gentle-

(Testimony of Russell J. Miedel.)

man who paid the Government for the property under your application for a patent?

A. That is right.

Q. That is \$2.50.

A. I am not even familiar with that.

Q. Well, you just put up the money and the others took care of the details?

A. The operation of the property was under the jurisdiction of Mr. Morrison, and I am not so familiar with the details of the operation; but in connection with Mr. Morrison and Mr. Cornish, I negotiated the deal we entered into in good faith with the United States——

Q. I am not questioning you about your dealings, Mr. Miedel, with the Government. I will grant you were acting in good faith. And you would state, too, I take it, that in your negotiations with the Government, with Mr. Chambers and Mr. Hjelm and the United States Engineers, that they were acting in good faith, wouldn't you?

A. Well, we assumed so.

Q. As far as that goes, everything was going along harmoniously, everything was going along nicely, until that landslide occurred, is that correct?

A. Well, we never received any money.

Q. Well, you know why, don't you? Didn't Mr. Hjelm explain that to you?

A. The only thing he told me was he was checking up on some old people that filed on it 50 years ago; he wanted to make a title search. And in that connection I will say, Mr. McMillan, I agreed

(Testimony of Russell J. Miedel.)

that I would be willing to put up a bond of \$50,000 that our title was all right. [160]

Q. You understand, Mr. Miedel, you appreciate, of course, I wasn't at the conferences. As I understand your testimony, you finally agreed on a sum, you said, of \$11,750, is that right?

A. I believe that was right. As I said before, I don't remember the exact—

Q. And the purpose of that was to give you the machinery to recover the gold?

A. That money was given to us after many talks and conferences by Mr. Hjelm for several reasons: First, he gave us that money because of the fact it was to be a stationary plant, and we couldn't use it when we were through; we had to have a portable plant to properly work those bars. In addition to that the engineers thought that the amount was too high, but we agreed to allow them to take the amount of gravel which they wanted from that property under certain conditions—you understand that we figured there would be 200,000 cubic yards in place removed and we figured the amount of money of the values recovered plus the work the Government would do would run well over a hundred thousand dollars—

Q. In this conversation wasn't it called to your attention that it was estimated it would require about 75,000 cubic yards for the construction of the concrete of the dam?

A. That was the minimum.

Q. That was the minimum?

A. Yes.

(Testimony of Russell J. Miedel.)

Q. But that figure was used, wasn't it?

A. Yes, sir.

Q. Well, you never had any signed agreement with the Government as to the payment of that money?

A. No, sir; all we did, we shook hands on it, which was a deal enough for me.

Q. It was explained to you, wasn't it, that any agreement Mr. Hjelm might make, he would have to submit to the War Department and recommend its acceptance, and the War Department would take [161] it up with the Attorney General's office and give its recommendation—I think he explained that quite clearly, that he could do nothing until he had submitted it to Washington and had it approved?

A. Mr. McMillan, Mr. Hjelm told me definitely that the duty of the United States Attorney was to make the best settlement possible, regardless of the War Department. In other words, he tried to make decisions for the Attorney General, and not the War Department, and he told me that several times when they weren't settled on the details——

Q. But he couldn't make any contract without approval from Washington? Didn't he say that?

A. He said he had authority from Washington to proceed with the deal.

Q. Yes, to proceed with the negotiations, but not to conclude them?

A. I don't know about that.

(Testimony of Russell J. Miedel.)

Q. I understand one of the reasons for having the condemnation suit was for Mr. Hjelm to clear up the title?

A. My recollection was that the reason the condemnation suit was filed was because we insisted in having this agreement in writing.

Q. Didn't Judge Hjelm, after having made this search of the title and found all these persons that were interested in the property, insist that the most expeditious way of getting the title cleared up was to have a condemnation suit filed?

A. No. My understanding, according to my recollection at that time, is what would happen when everything was settled and he had these people out of the road, he would go into court and agree with my attorney on the deal we had negotiated.

Q. He did tell you he had a title report that revealed a great many persons interested in the property?

A. That is right.

Q. Yes. And that he would file a condemnation suit naming all [162] these parties, and then he would come into court and an arrangement with you and your attorney would be made to clear this up satisfactorily and without trouble to yourself? Didn't he tell you that?

A. That is correct.

Q. Now, everything was going along serenely and harmoniously, wasn't it? There may have been a little delay here and a little delay there, but in your judgment, don't you think things would

(Testimony of Russell J. Miedel.)

have been satisfactorily concluded if this landslide hadn't come along and disrupted all plans?

A. Mr. McMillan, I have been in business a long time, and I have always found that when you make a deal and it turns sour, you pay. That is the way I have done. It wasn't any fault of mine——

Q. That is not the point of my question. The point of my question is, everything was going along nicely; you were working on clearing the title to the property, and Judge Hjelm said that the best way to clear the title would be to file this condemnation suit? A. I think that is right.

Q. And in that connection you went ahead in good faith and sent the money along with your application for patent after the suit was filed, about 20 days, in payment for the patent, and maybe six or eight months after the suit was filed you got the patent to the property, didn't you?

A. That is right.

Q. So you didn't get your title to the property, your patent—that is, yours and Mr. F. M. O'Connor's—isn't that correct? A. Yes.

Q. And Stella O'Connor, his wife—until many months after the suit itself was filed? That is all true? I am trying to paint this picture, if I can, from your testimony, Mr. Miedel, that all parties were working harmoniously to get this thing in shape as soon as possible, in connection with and pursuant to [163] negotiations you had had, isn't that true?

A. Yes, I would say Mr. Hjelm wanted to con-

(Testimony of Russell J. Miedel.)

clude the matter up just as much as we did and get it out of his office.

Q. As to whether or not, personally, Mr. Pollock ever went into possession of the property, and what he did up there, you don't know, do you?

A. Well, it is all hearsay.

Q. Yes. Personally, you don't know?

A. I will say this: I was in Mr. Hjelm's office with Mr. Morrison, and Mr. Hjelm turned around to Mr. Pollock's foreman, Dunning, and he said, "You can take possession of this property"——

Q. When was that?

A. That was sometime in 1939, is my recollection.

Q. Was it after the suit was filed?

A. It was before the suit was filed.

Q. You don't assume that Mr. Hjelm would have any authority to give anyone any possession of the property, do you, for the Government?

A. He made that statement in front of Mr. Morrison and I.

Q. Well, that only indicates that everybody was acting in good faith and you were going on through the transaction as soon as you could, doesn't it?

A. Yes, sir.

Q. And Mr. Hjelm himself took it for granted that you were going on through the transaction?

A. Yes, sir.

Q. That is that. Now, as I understand it, going to the first—Major Harrison—was that his name—first came to you about some gravel?

(Testimony of Russell J. Miedel.)

A. I think, Mr. McMillan, what I said was I think his name was Major Harrison. I wasn't certain.

Q. Well, that was long before, about three years before you started your negotiations with Judge Hjelm and the others, wasn't it?

A. Well, that was in 1936, and we had many meetings [164] from 1936 on. I wouldn't say——

Q. Well, you had, then, as early as 1936, heard about that proposed Ruck-a-Chucky Dam?

A. We heard about it, and the reason we investigated it was because we were getting ready to buy mining machinery, and we figured there was no use going in there if the Government was going to take it from us.

Q. You had heard of it? A. Yes.

Q. You never did buy any mining machinery?

A. No, sir—only what we bought originally, before the flood.

Q. You said something about the Reconstruction Finance Corporation was lending money at that time on mining claims to encourage the development of mining. Did you ever make an application to the Reconstruction Finance Corporation for a loan?

A. No, sir; it wasn't necessary. I was able to finance this myself.

Q. Well, did you? Was an application made to the Reconstruction Finance Corporation for a loan? A. Not to my knowledge.

Q. Isn't it a fact you sought information of

(Testimony of Russell J. Miedel.)

the Reconstruction Finance Corporation to see what the requirements would be on a loan of \$25,000?

A. We naturally investigated all phases of the business, because there was a considerable amount of money involved. I personally didn't investigate the Reconstruction Finance Corporation, but I am quite familiar with their laws, because we had quite a few dealings with them in handling the container needs of our customers in the glass business I am in. I am familiar with what is required in a general way, but as far as I am personally concerned, I never made any application, never called on them, or never saw them.

Q. Do you know whether or not Mr. Morrison, who took active charge of this property, sought any information in reference to a proposed loan of \$25,000, and was advised that before a loan could [165] be made you would have to sink at least 20 holes and stagger them according to the requirements set forth, and it was concluded that it would cost \$20,000 to do that, so no application was ever made?

A. I discussed it in a general way with Mr. Morrison. I don't know the details, but I do know I never signed any application for a loan.

Q. You know no application was made, but in reference to these figures as I have given them, I have stated them about right?

A. It is my recollection, Mr. McMillan—I am not positive about this—holes had to be sunk—shafts, I think it was, every five feet, and we

(Testimony of Russell J. Miedel.)

estimated it would possibly cost us, according to the figures we had, about at that time—I think it was somewhere around \$3,500.

The Court: The Court will take a ten-minute recess.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, I think I only have one or two questions to ask of Mr. Miedel.

Q. Is this not correct: that the reason that you tried to make arrangements that the gravel would be taken at a certain depth, that you regarded that the values were down deeper in the property?

A. We figured that the further down we went to bedrock the greater the values would be.

Q. I was just looking at an affidavit filed in this proceeding by Mr. Morrison, and I observe in this affidavit that he states that on October 10, 1939—(reading):

“On October 10, 1939, the Defendant R. J. Miedel renewed his offer under all the terms and conditions set forth in Exhibit A attached hereto, except the cash price was reduced from \$12,500 to \$11,875.” [166]

You said \$11,750. I guess the correct amount was \$11,875.

A. Yes. I told you, Mr. McMillan, I didn't recall the exact amount.

Q. Yes. And then (reading):

(Testimony of Russell J. Miedel.)

“Defendant further states said offer was reduced to writing, a copy of which is attached hereto and marked Exhibit A, and that said offer was never accepted.”

You said that the offer had been accepted.

A. I never talked to Colonel Chambers again. That was the only session that I recall that he was in. But I did have further sessions with Judge Hjelm, and he said that he thought that the colonel was very well pleased to get this reduction, because he understood at that time that he had authority from the Attorney General of the United States to negotiate the deal on the basis of \$12,500, and he thought the colonel was seeking a little glory.

Q. What Mr. Morrison had in mind was it had never been signed up.

A. Never been signed up.

Q. That is what he actually had in his mind?

A. Yes.

Q. Had it ever been brought to your attention that there was about 45,000,000 pounds of black sand on that property up there that carried platinum, chromium, and all that, and that was worth a dollar a pound?

A. All I know about that is in a general way. I heard the matter of black sand discussed, but I don't know whether——

Q. In other words, Mr. Morrison, or no one else, has ever been able to interest you in the black sand, has he?

A. We talked about the black sand in a general

(Testimony of Russell J. Miedel.)

way on the property, but as to the value of it, I have no basis—I [167] understood there was a trace of platinum and things of that kind in it, but just how much I didn't know.

Q. To a business man of your experience, if anyone told you there was \$45,000,000 worth of black sand, I imagine you would prick up your ears, wouldn't you, on your property?

A. Yes, I would be very much interested.

Mr. McMillan: That is all.

(Witness excused.)

Mr. Cornish: Mr. Mead, will you take the stand, please?

WILLIAM HOWARD MEAD,

called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Where do you live, Mr. Mead?

A. I live at 1007 Harvard Road, Oakland, California.

Q. What is your business?

A. I have a business in San Francisco which is part sales representation, part construction, and part engineering.

Q. With what type of commodity?

A. Well, we represent the Heinemann Company

(Testimony of William Howard Mead.)

in the 11 Western States in the sale of crowns, tin crowns; represent the Michael Yunt Company of Waukeshau, Wisconsin, in the sale of bottle-washing and pasteurizing equipment; we represent several firms in the dehydrating field, water hoists; we have built blood-transfusion valves in the amount of about 6,000 of them for the Cutter Laboratories of Berkeley, California; we have built special machinery for them; we have done special types of viscosimeters. When this war started I offered my services to the Marines, and I haven't been accepted, and the net result is I thought I should do something, and we built a new type dredge, and we are preparing at the present time [168] to ship one to Bolivia to dig some tin in the Cochabamba region.

Q. How long prior to the war had that dredge been designed?

A. The dredge had been designed in 1935, was the first design made of the dredge. It was originally built by Gus G. Baker down in Fresno, in connection with Herbert Hopkins, and it is a new type low-cost digging unit.

Q. And what is the principle on which that dredge operates?

A. The velocity of water passing through an orifice serving as a carrying medium.

Q. Is it what is customarily referred to as a suction dredge? A. It is.

Q. In other words, a pipe is placed down into the water, and as a result of the velocity of the

(Testimony of William Howard Mead.)

water in being carried through this pipe, the solid substances in and about the water are carried through that pipe with the water?

A. That is true.

Q. And has that dredge been tested, Mr. Mead?

A. Well, in the form of a test, I might say that the first boat was a four-inch boat—the four-inch designation meaning the size of the discharge of the pump which was employed to pump the water, which in turn carried the solids. It was built in Fresno by the Valley Foundry & Machinery Works, and it was put out on the San Joaquin River at the Friant Dam 14 miles from Fresno. The first four-inch unit had a capacity of displacement of 400 yards per day, 20-hour operation.

The second unit that was built as the result of the successful operation there was a six-inch boat. That had a six-inch pump and handled about 1,900 gallons of water a minute through this revolving suction head, with a limited orifice in the bed. That boat handled 900 yards a day. [169]

The values they were recovering were within eight per cent—the values that were recovered were within eight-tenths of one cent of the total values as the operators had drilled them, as shown on their drill sheets.

Q. And for what particular commodity were these operations designed?

A. Prior to the war it was for gold.

Q. And you say that they recovered within eight-

(Testimony of William Howard Mead.)

tenths of one cent of what the tests, the drilling tests, had established were present in the ground?

A. That is right. The drill samples showed that the soils were worth about 10½ cents a yard, and they recovered within eight-tenths of a cent, and royalties were paid on the balance, which can be checked with Mr. A. S. McGuire in Fresno.

Q. Now, have you, since the war, developed this dredge further?

A. Well, there have been four eight-inch dredges built as the result of the success of the six-inch dredge.

No. 1 is the boat which we have at the present time, which we are re-designing and re-building for dredging tin, to be sent to South America.

The second boat was sold to Mr. Bill Franklin of Montana and put on the Missouri River.

The third boat was sold to Mr. Cowden and put on the Klamath River.

And the fourth boat Mr. Baker owns himself—or rather, he owns half of it, I will put it that way.

Q. Are you familiar with the property that is involved in this litigation that is sometimes called Cherokee Bar and sometimes called Spanish Bar, on the Middle Fork of the American River?

A. I have been there several times.

Q. And will you state your opinion, Mr. Mead, as to whether this [170] dredge that you have designed will dredge the gravels and recover the gold that exists on that property?

A. Well, primarily to dredge—I didn't design it;

(Testimony of William Howard Mead.)

we have added improvements to it. The fundamental principles were by Mr. Baker——

Mr. McMillan: May it please your Honor, the proper foundation has not been laid; the witness has not qualified himself; and secondly, there has been no test made by this equipment to which the witness has testified upon this property; and further, the foundation has not been laid as to the extent of the study and examination he has made on that property up there.

Mr. Cornish: Q. Mr. Mead, has this dredge of your own been operated on gravels similar in form?

A. Quite similar.

Q. And structure, to the gravels on this bar?

A. It is similar to the gravel—any free-flowing gravel can be handled by this dredge. Cemented gravel, no. To the best of my knowledge, without putting down any pits, the gravel on the Cherokee Bar is not cemented.

Mr. McMillan—I ask that go out; he has testified “to the best of my knowledge”——

The Court: It may go out.

Mr. Cornish: Q. Assuming, Mr. Mead, that the gravel on this bar is not cemented, in your opinion would this dredge that you built recover the gold that might be in that gravel bar now, assuming that the gravel is not cemented?

Mr. McMillan: I still, may it please your Honor, state that he has not laid the foundation. He has not submitted yet for my understanding—I may be very obtuse—just what tests he has made, what

(Testimony of William Howard Mead.)

examinations, what depths he went down into the gravel, what soil conditions he found. I am still on top of the surface [171] there, from all I know, in the gravel on top of that property.

Mr. Cornish: May it please your Honor, the evidence which has been heretofore submitted, shows that this gravel is a free-running gravel; that it must be timbered all the way down in order to keep the hole from caving in, and that the lower portion of it is below water. Mr. Morrison has testified that in the two holes he sunk it was necessary to keep them timbered, and timbered tightly, in order to keep the holes from caving in, and that he was working under water at the bottom part of these excavations. Your Honor will recall that one of the things he did in the shaft behind the cabin was to sink a sump hole, a six-foot sump hole, in order to accumulate the water that leaked through the workings, to keep the bottom of the cut dry.

Now, all the testimony shows this is free-running, and not packed gravel. The witness has testified that this dredge has worked in river gravels that were not cemented.

Now, I have asked him the question, supposing the hypothesis to be that this were a free-running gravel, not cemented, whether in his judgment this dredge which he builds would recover the gold on this property.

Mr. McMillan: May it please your Honor, if the witness has established his qualifications, I have heard no testimony that he has ever operated one

(Testimony of William Howard Mead.)

of these equipments in this kind of gravel or elsewhere. He has simply given us a good description of the equipment, but as to his operation, as to what he has done as a mining engineer or an expert, and the extent of his mining operations and his knowledge of mining operations, and so forth, or metallurgy or minerology, we have no foundation. If he goes ahead and qualifies himself in that respect, then there will be no objection, I respectfully submit, to Mr. Cornish [172] establishing his theory of the case—which is not our theory of the case—and upon the facts on which his witness have already testified, framing and putting to this witness a hypothetical question—I didn't see this witness in the courtroom when Mr. Morrison was testifying to all his testimony. I admit this gentleman is a very learned man, but he hasn't submitted proper qualifications as an expert to give testimony and figures——

Mr. Cornish: I will withdraw the question.

The Witness: Your Honor, I wonder if I may have the opportunity——

Mr. Cornish: Q. Mr. Mead,——

A. Pardon me.

Q. What has been the extent of your own operation of this particular unit, and the extent of your own observation, first-hand observation of the operation of this unit by others?

Mr. McMillan: I object to that question, your Honor. It is apparent now that his observations would be insufficient. He would have to operate, or direct the operation of this equipment——

(Testimony of William Howard Mead.)

Mr. Cornish: Let me break the question up.

Q. What has been the extent of your direct operation of this equipment?

A. We have been for the past——

Mr. McMillan: Just one moment.

May it please your Honor, I like to deal in the first person.

A. (Continuing): I have been, for the past nine months, sir, developing the ground on the Carson River for the recovery of six million pounds of mercury that the U. S. Bureau of Mines have records of, that were dumped into the river in the shape of free mercury and in the form of amalgam of both gold and silver. Tests I have made with that boat in the river—that I have operated, sir—prove conclusively that the values I can recover [173] with that boat, are in excess of 60 cents a yard.

Mr. Cornish: Q. Has that been the extent of your operation of this particular unit?

A. No, it has not been. I am a half-owner in that operation up there; I own a half of the boat and a half of the proceeds that will, no doubt, come from it. I believe that the dredge is to start this morning, and for your information, sir, if you would like to see it, it is seven miles east of Carson City.

Mr. McMillan: No, I am not interested in its operation.

The Witness: The boat has a record of recovering over 90 per cent of the tested values, which Mr. Van Dine, of the Yuba Manufacturing Company, can testify to. I have operated one of a test propo-

(Testimony of William Howard Mead.)

sition in the State of Nevada, 60 miles south and east of Ely, for five months of last year, recovering a small amount of scheelite, tungstic oxide.

We are now setting up one with de-watering canes, a new type of recovery equipment, with magnetic jigs to eliminate the black sands, so that the concentrates can be more easily handled, prior to shipment to South America for the recovery of tin.

That is the extent of my knowledge of the subject, sir.

Mr. Cornish: Q. Now, from your experience in operating this particular dredging unit, Mr. Mead, and assuming that the gravels on this property that is in question in this action are loose, and not cemented, in your opinion would this dredging unit of yours recover 90 per cent, or substantially 90 per cent of the gold value in that gravel?

Mr. McMillan: May it please your Honor, I object to the question on the ground that the proper foundation has not been laid. This witness has not qualified himself. This equipment he refers to, I gather, was more or less in an experimental [174] stage——

The Witness: Eight years ago, yes.

Mr. McMillan (continuing): ——during the period here under consideration, that is, from October 10, 1939, until the property was abandoned. This witness has given no testimony, or laid no foundation to show that during that period, or any other period in this region, where similar soils existed, and under similar conditions, similar gravel, similar sand,

(Testimony of William Howard Mead.)

similar bedrock, that he has operated this wonderful equipment of his upon.

Q. That is true, isn't it?

A. No, that is not true, because you missed my statement that it was operated in 1939——

Q. But you never have operated it in this vicinity, have you?

A. In this vicinity? What vicinity?

Q. That is, in Placer and El Dorado Counties, on the Middle Fork of the American River.

A. No.

Q. I am talking about the period from October, 1939, until one year and eleven months thereafter.

A. There has been no boat operating——

Q. No boat during that period?

A. (Continuing) ——in this particular area.

Q. Where did it operate during that period?

A. On the San Joaquin River, at the Friant Dam.

Q. And what were you doing at that time?

A. Digging gold.

Q. Did you do it?

A. No, I didn't do it; Mr. Baker did it.

Q. The machine at that time was purely in an experimental stage, was it not?

A. It was not, sir.

Q. It was not? A. No.

Q. I suppose you will develop this machine until where, after the war is over, it will supplant all of these other equipments? A. No. [175]

Q. Not all of them, but some of them?

A. It may.

(Testimony of William Howard Mead.)

Q. And gold can be recovered at a higher value?

A. No, gold cannot be recovered at a higher value, but at a lower cost.

Q. It will be more profitable to the mining industry?
A. That is right.

Mr. McMillan: I submit my objection is well founded, your Honor.

The Court: The objection is sustained.

Mr. Cornish: Q. Mr. Mead, from your examination that you have made of the gravels on this bar, how do they compare to the gravels on the San Joaquin River in which this boat has operated?

A. Well, we dug one hole down to water level——

Q. That was dug where?

A. Well, from the cabin, it would be north——well, practically due west, I would say; practically due west from the cabin location. It was down in the flat, not on the——the contours do not show there (referring to map on blackboard)——

Mr. McMillan: When, may I inquire, Mr. Cornish?

Mr. Cornish: Q. When did you dig that hole?

A. Well, I am sorry; I don't remember. It was over two years ago, however.

Q. Over two years ago?

A. Yes; a year and three-quarters to two years ago. I am not sure of the date.

Q. You recall there is a high shelf of gravel, and it drops down, and then there is a low shelf leading to the river?

(Testimony of William Howard Mead.)

A. It was on the lower bench; it was nearer to the water than to the cabin, and the water was at low level at that time.

Q. How deep was that hole dug?

A. As I remember, we went down four feet, and the periphery of the hole—when we started—would be somewhere around 25 feet, and it was 28 feet by the time [176] we got down four feet, which proved to us that the land would slough great enough for us to take yardage at a high rate.

Q. You found, from the hole that you dug at that point, that this was a loose-flowing gravel?

A. That is right.

Q. How did it compare to the gravel in which your boat had operated in the San Joaquin River?

A. Well, it wasn't my boat which operated in the San Joaquin River, but I was on it a good portion of the time.

Q. In addition to being on the boat and seeing it operated, you did physically operate it yourself?

A. I did.

Q. And that was on the San Joaquin River?

A. Yes.

Q. How does the gravel on the middle fork of the American River compare with the gravel on the San Joaquin River, as far as the ability of your boat to dredge that is concerned?

A. Well, without more analysis, I can't answer the question accurately, but it appeared there was a bit more sand than the San Joaquin River.

Q. Was the gravel in the middle fork of the

(Testimony of William Howard Mead.)

American River as free-flowing, or less free-flowing, than the gravel in the San Joaquin River?

A. It seemed to be the same.

Q. It seemed to be the same? A. Yes.

Q. Now, Mr. Mead, from the observation you have made in the operation of your boat in the San Joaquin River, and your experience with that unit, is it your opinion that that unit would dredge and recover the gold values from the middle fork of the American River?

Mr. McMillan: At what time?

The Witness: Can I answer your question?

A. Yes.

Mr. McMillan: One moment. [177]

May it please your Honor, counsel has completed the question. I object to it on the ground that the proper foundation has not been laid.

Mr. Cornish: All right. Let me put it this way:—

Mr. McMillan: And it is a hypothetical question, in which he has not included all the proper and necessary elements.

Mr. Cornish: Q. From your observation of the gravel in the San Joaquin River, and in the middle fork of the American River, on this property, in your opinion would the unit which you have built and to which you have testified recover the gold from the middle fork of the American River, on this particular property, on the 10th of October, 1939?

Mr. McMillan: Object to the question, may it

(Testimony of William Howard Mead.)

please your Honor, upon the ground it is purely speculative, and the proper foundation has not been laid.

The Court: The objection is sustained.

Mr. Cornish: Your Honor, I don't know what more I can do. The witness has testified—I submit the question again—he has testified he has operated the unit, operated it in similar gravels, and recovered gold.

I have no intention of asking the witness how much he would recover from this property, but merely whether it was a usable unit, and I feel he has testified, so far as experience is concerned, so far as observation is concerned, so far as knowledge of mechanics is concerned—I don't know what counsel has in mind that I have left out in laying the foundation.

Mr. McMillan: I have many things in mind, may it please your Honor. He is seeking to show this witness is interested in some suction form of operation, and the witness has already testified to the short depth he has gone down into the gravel, the [178] poor examination that he made. He testified that he never actually directed any operations in similar soils; he has not gone down to an extent in this soil that we have to consider in reference to gold gravels in this case. There could be that there are boulders, there could be many kinds of soils that would interfere with the operation of this plant. It is purely speculative. The man never went in there and operated that equipment. He has dug a hole of the size he

(Testimony of William Howard Mead.)

has indicated to the Court, and I submit, may it please your Honor, that is not the type of examination and study that would qualify him to give an opinion as to what would be encountered, or what would be accomplished with the mining of this property with this equipment of his.

Mr. Cornish: May it please your Honor, there has never been any witness who has gone in on this property with any particular type of dredging equipment. The most you can ever do in determining whether a property is dredgable, before it is actually dredged, is to make your examinations of the gravel, take your particular equipment and estimate what the cost of the equipment would be, and what the recovery would be based upon the sampling. It is all a matter of speculation. It is all a matter of opinion.

Now counsel seems to take the position that before we can show what could be expected to be recovered, that someone must have gone on this property and actually operated a dredger. I don't believe counsel is correct in that contention.

Mr. McMillan: Counsel is not correct in his contention that it is counsel's contention you have to operate a dredger on this property. The contention of counsel is that counsel is contending something which, first, is purely speculative, as counsel has already insinuated in his opening statement, and, secondly, this [179] testimony as to a wonderful outfit that might have recovered more gold at less cost is, as I see the situation, time-consuming and, may

(Testimony of William Howard Mead.)

it please your Honor, an utter waste of time. What if he brought a great number of witnesses here and had them testify: "Could you use up there an outfit of two yards' capacity of this kind of machinery? What do you think about a doodle-bug operation in connection with that property?" and so forth. Purely to give testimony before your Honor of the equipment; first, its utility, and next, as to whether it is better than any other equipment in existence which may have been considered in connection with this property—it is its highly speculative nature to which I am objecting.

Your Honor will appreciate the very meager, very thin-skinned test and examination that this gentleman made on that property up there, when your Honor considers the size of the hole that he dug up there, and when we have testimony from the witness, Mr. Morrison, that there is 1,300,000 cubic yards of gravel, and when we have information before the Court as to the depth at which this gold was taken. I think it is speculative. I think it is purely thin and time-consuming.

The Court: The Court has ruled.

Mr. Cornish: May it please your Honor, it is my purpose to ask the witness merely two more questions, namely, what the cost of that plant is, and what its cost of operation per day or per yard of gravel handled is. Now, I realize that in the ultimate it is up to the Court to decide whether this plant is feasible, and I think counsel's objection goes more to the weight than to the admissibility. So far as what

(Testimony of William Howard Mead.)

gold would be recovered is concerned, I don't have that in mind. This man is merely called for the purpose of testifying to the cost of the equipment and to [180] the cost of operating it, and not what it would recover.

Mr. McMillan: Well, you haven't laid the proper foundation in that, even.

Mr. Cornish: In other words, I am not asking this witness to testify to how much gold there is in the bar, how much gold he would recover, what his knowledge of the gold in the bar is; I am merely laying the foundation to qualify him to testify to the cost of the equipment and the cost of operating the equipment.

Mr. McMillan: May I ask a question in the nature of voir dire, preliminarily?

Q. Let me ask you, Mr. Mead, you don't contend that if you went down to a depth, we will say, of 22 feet, and you encountered boulders and rough bedrock and heavy gravel, that is often the case up there in these dredging operations, that you could operate this machinery, do you?

A. Most successfully, sir.

Q. You could handle boulders?

A. Most successfully, sir.

Q. Had that machinery operated, during 1939, anywhere along these rivers?

A. Yes, sir.

Q. Where?

A. On the San Joaquin River, in front of the Friant Dam, at Fresno, sir.

Q. Any boulders encountered there?

(Testimony of William Howard Mead.)

A. We only take—do you know how our unit is built? Do you want to know how our unit is built?

Q. I really don't know, and we don't have time to go into it here. I know it is very interesting, but it is too time-consuming.

A. All right. Then to answer your question regarding boulders, we merely dig material which is two-inch minus in a 36-inch diameter circle——

Q. That is all you handle?

A. Yes. (Continuing) ——at each movement of the head. [181]

Mr. McMillan: Yes.

I still submit my objection, may it please your Honor.

The Court: The objection is sustained.

Mr. Cornish: May I ask the witness one additional question?

Q. Has your dredge operated in ground that had large boulders present?

A. Yes; on the Carson River.

Q. And what has been your experience in operating in ground with big boulders in the Carson River?

A. That the capacity of the boat jumps up appreciably, because we don't handle anything larger than two-inch minus.

Q. In other words, the larger your boulders the faster you are able to excavate or dig out the gold and the smaller substances in a given yardage?

A. That is right.

Mr. McMillan: I think I can shorten this, may

(Testimony of William Howard Mead.)

it please your Honor. If counsel simply wants to ask the witness what an outfit like that would cost, I have no objection to it, as long as he doesn't undertake to operate it.

Mr. Cornish: Q. Mr. Mead, what is the cost of manufacture and installation of this particular unit?

A. You mean the selling price?

Q. The selling price, plus the cost of installation of this unit on this property on the middle fork of the American River.

A. If the machinery could be procured and a priority could be gained to build it, it would cost in the neighborhood of not more than \$22,000. The cost of moving in would not be more than \$1,500, and by "moving in," I mean moving the material from San Francisco to the Cherokee Bar and setting it up ready for operation, which doesn't include housing for the men who operate it.

Q. How would the cost of today compare with the cost of October, 1939?

A. I am sorry, I can't answer that question. [182]

Mr. McMillan: That is irrelevant, and I don't believe the witness would know, anyway.

The Court: Well, he said he didn't.

Mr. McMillan: Yes.

Mr. Cornish: Q. And from your experience, Mr. Mead, in the operation of these units, what does it cost per yard of gravel taken into the machine to operate this unit?

Mr. McMillan: I object to that, if it please your

(Testimony of William Howard Mead.)

Honor, again upon the ground that the proper foundation has not been laid.

The Court: The objection is sustained.

Mr. Cornish: That is all, Mr. Mead.

Mr. McMillan: No cross examination.

(Witness excused.)

Mr. Cornish: Mr. Wiltsee, will you take the stand?

ERNEST A. WILTSEE,

called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Mr. Wiltsee, where do you live?

A. I live in the Pacific Union Club, San Francisco.

Q. And what is your business?

A. I am a mining engineer by profession, a graduate of Columbia University, Class of 1885.

Q. How long have you been engaged in the mining business?

A. There are two branches of the mining business. I have been engaged in the quartz branch of it since 1888, and in gold dredging since 1940.

Q. Gold dredging since 1940?

A. Forty years—I mean since 1900.

Mr. McMillan: Mr. Cornish, I know of this distinguished [183] gentleman. You want to qualify

(Testimony of Ernest A. Wiltsee.)

him in what way? I might be able to concede his qualifications as a mining engineer. What else?

Mr. Cornish: And his knowledge of this particular property.

Mr. McMillan: That I am not prepared to give a stipulation on. I will go this further: I will stipulate that he is eminently qualified to conduct a dredger, dredging outfit, and that he owns several of them. I will go that far.

Mr. Cornish: All right.

Mr. McMillan: As to his fundamental, preliminary qualification, his college education, his long experience as a mining engineer and all that, I will quite readily grant you that.

Mr. Cornish: Thank you.

Q. What has been the extent of your knowledge of this property? You know the property that is involved in this case? A. Perfectly well.

Q. What has been the extent of your acquaintance with this property, Mr. Wiltsee?

A. Well, I secured options on all those bars on the Middle Fork, beginning down from Murder Bar, all the way up about six miles, but I couldn't, and have not yet, succeeded ever to get an option on this property, but I was given permission to drill it and ascertain its value.

Q. By whom were you given permission to drill it? A. Mr. Stanley.

Q. Mr. Stanley? A. Yes.

(Testimony of Ernest A. Wiltsee.)

Q. When was that, Mr. Wiltsee, with reference to the 10th of October, 1939?

A. With reference to the 10th of what?

Q. 10th of October, 1939.

A. Well, I think that is the time that we drilled the property. If you have some drill logs I made, that will tell the date.

Q. I have some copies of some drill logs (exhibiting documents [184] to Mr. McMillan)——

Mr. McMillan: I wish Mr. Wiltsee would fix that date. I believe Mr. Wiltsee should refresh his recollection as to that date.

Mr. Cornish: Q. Mr. Wiltsee, referring to these drill logs of August, 1939, is that the approximate time Mr. Stanley gave you permission to drill the bar?

A. He gave me permission before that, of course. I went there after I got permission.

Q. In other words, it was before August, '39, Mr. Stanley gave you permission to make these drillings?

A. Yes.

Q. Now, in your opinion, Mr. Wiltsee, as a mining engineer, can this property be operated and mined with a doodle-bug, what is commonly referred to as a doodle-bug, a dragline, and separate boat mining operation?

A. It can be operated successfully by a sufficiently large and capable dragline—I don't call them doodle-bugs, but dragline plants, consisting of a dragline and a floating boat, in which the values are recovered.

(Testimony of Ernest A. Wiltsee.)

Q. By sufficiently large, I presume you are referring to the yardage of the bucket on the dragline?

A. Yes.

Q. And also the capacity of the concentrating device to handle the output?

A. The boat should be sufficiently large and the riffle and screen capacity large enough to make the recovery of gold from the material brought up in your bucket.

Q. In your judgment, Mr. Wiltsee, how large a capacity bucket would that be?

A. I wouldn't go in there with less than a three-yard bucket.

Q. Three-yard bucket?

A. Three-yard bucket.

Q. And with the use of a three-yard bucket, what would be the cost per yard for dredging?

A. Cost per yard?

Q. Yes. A. Well, about 12 cents a yard.

Q. About 12 cents a yard?

A. 12 cents a yard.

Q. Now, you took, or under your direction certain drilling tests of this gravel were made, you said? A. Yes.

Q. And you have given me a map——

A. Yes.

Q. (Continuing): ——and on this map correctly appears the three, six, eleven holes that were drilled on this property?

A. I couldn't tell you how many until I look at the map.

(Testimony of Ernest A. Wiltsee.)

Mr. Cornish: Yes.

Do you want to see this map, Mr. McMillan (exhibiting map to Mr. McMillan)?

Mr. McMillan: Mr. Foley, I know, wants to see it.

(The map referred to was exhibited to counsel.)

Mr. Cornish: Q. Is this the map, Mr. Wiltsee, to which you refer?

A. That is the map. Our procedure is—if I may be permitted to say it—our procedure is to locate the drill holes and get the results, and afterwards send my surveyor up and survey the location of the holes on the map, as has been done in this instance.

Q. And the various points, “A-1, A-2, A-3, B-4, B-5, B-6, C-7, C-8, D-9, D-10” and “D-11” are the positions where the holes are put?

A. Yes. Our procedure is, we number our drill holes, and then number of the line of holes in a section with letters. We run them as you see on this map. All these holes are in line in each section, and all these letters refer to sections that the drill holes are in, with the first, “A,” then “B,” “C,” and “D.”

Q. And there is what appears like a fraction—for instance, this one at A-3; you see the figure “18.0” and a line, and underneath that the figure “69.7.” What do those refer to?

A. That is the way that, for convenience, we always put them on [186] the map. We put the depth of the hole first over the bar, and underneath the

(Testimony of Ernest A. Wiltsee.)

bar the dollars and cents. We do that always in all the properties we drill.

Q. And those figures would be the depth of the drill hole——

A. The upper figures are the depths and the lower figures the value in cents.

Q. Value in cents per yard?

A. Per cubic yard.

Mr. Cornish: Have you any objection, Mr. McMillan, if I transcribe this map over here to the blackboard? This is Mr. Wiltsee's map, and I don't like to offer it in evidence, because it may be some time before he will be able to get it back, or if you have no objection, I would like to offer it in evidence and make a tracing of it, and withdraw the map and replace it with that tracing.

Mr. McMillan: Maybe I can work out a plan that will be more convenient.

There was a very good suggestion made by Mr. Stanley, may it please your Honor. He said it will only take a few minutes to have a photostatic copy made of this; the Engineering Department will do it.

Mr. Cornish: May we offer this map in evidence, then, and then I take it the United States Engineers will make a photostat of that, and that photostat may be substituted and the map withdrawn this afternoon?

Mr. McMillan: Will you have that photostat here by two o'clock?

Mr. Stanley: Yes.

(Testimony of Ernest A. Wiltsee.)

Mr. McMillan: It will be here at two o'clock, your Honor.

The Court: Very well.

Mr. Cornish: We will offer this map, with the figures thereon, [187] and ask it be marked the defendants' exhibit next in order, with the stipulation it may be withdrawn and the photostat substituted.

(The map referred to was received in evidence and marked Defendants' Exhibit M.)

Mr. McMillan: Now that the Clerk has marked it, your Honor, may I hand it to the Engineering Department for the purposes indicated?

The Court: Yes.

Mr. McMillan: I am sure you will get your map back all right.

The Witness: Thank you very much.

Mr. Cornish: Just one further question, Mr. Wiltsee:

Q. You have no interest in this property at the present time?

A. No, sir, I haven't any interest at all.

Mr. Cornish: You may cross examine.

The Court: Well, it is twelve o'clock. We will recess until two o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [288]

Thursday, November 18, 1943

2:00 o'clock p.m.

ERNEST A. WILTSEE,

recalled for the Defendants; previously sworn.

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, during the lunch hour we had the photostatic copies made of Defendants' Exhibit M, so I am going to return now to Mr. Wiltsee the original.

The Witness: Thank you very much, Mr. McMillan.

Mr. McMillan: Mr. Cornish has a copy, and the other copy, with the original exhibit endorsement of the Clerk, I hand to the Clerk.

Had you concluded your direct examination?

Mr. Cornish: You were cross examining at the lunch hour, Mr. McMillan.

Mr. McMillan: No, but I will proceed.

Mr. Cornish: I thought you were. If not, I have not concluded—I have a couple of more questions I would like to ask Mr. Wiltsee.

Mr. McMillan: No, I haven't asked any questions on cross examination yet.

Direct Examination
(Resumed)

Mr. Cornish: Q. Mr. Wiltsee, you are interested, I believe you said, in a portion of the American River, the Middle Fork, both below and above this property?

A. Yes. I have under lease all the river, the

(Testimony of Ernest A. Wiltsee.)

dredgable river below, and even above Mr. Miedel's property.

Q. Both sides of this property, but not this property itself? A. Not this property itself.

Q. Now, it is your intention to dredge the Middle Fork of the [189] American River?

A. I will dredge the whole river. I have two plants I am going to move over there, one for the upper bar, beginning at Poverty Bar and going on up, and the other is the large rig I have over in Oroville, where we have been working the Feather River for several years—and, of course, the Feather River is a much larger river than this, and much more turbulent in the winter, much higher water—and as soon as I get through with my dredging at Oroville, which will be some time in May, I will remove the portable plant—that is, if the Government will be good enough to permit me—and go over and work on the lower part of the American.

Q. In your opinion as a mining engineer, Mr. Wiltsee, could this property which is involved in this section be mined with equipment similar to yours on a profitable basis?

A. Oh, certainly. I have paid over \$20,000 in royalties holding these properties until I can get around to them, until the war is over and I can get at them, and there isn't any question at all that—there is very little hard bedrock—I don't remember that we had a hard bedrock hole in Mr. Miedel's property—the records will show—while in the lower part of the American there is some bedrock, but that is

(Testimony of Ernest A. Wiltsee.)

not a great obstacle with us with these heavy drag-line buckets. With these heavy buckets we can go into that bedrock as far as we want to, take plenty of time, and clean that bedrock perfectly. In fact, I believe a dragline dredge can clean bedrock far more efficiently than a bucket line dredge. That has been my experience, and I have been interested in dragline dredging since 1900.

Q. In your opinion, Mr. Wiltsee, as a mining engineer, this equipment you have on the Feather River, or equipment similar to it, with a three-yard bucket, would clean the bedrock and get [190] substantially all the value?

A. Oh, yes. In all the years' experience in drag-lining we have had we have found the dragline dredge to be the most efficient in bedrock. We have come onto 25, 30, and 35 cent ground, and we have come within one or two cents a yard in recovery of our drill values. Those are according to my records.

Q. And you believe that can be done on this bar?

A. Oh, yes; no question.

Mr. Cornish: That is all.

Cross Examination

Mr. McMillan: Q. You don't know of any better method than yours for recovery of gold values?

A. No; by experience, Mr. McMillan, because we have been working there along the Feather for four years now, and we have had no trouble whatsoever. We have recovered right up to our drill values, and personally, while I am familiar with all these differ-

(Testimony of Ernest A. Wiltsee.)

ent methods of dredging, I don't think there is anything for river dredging which will compare to a big dragline plant, because the difference between the dragline rig and the bucket line dredge is that the dragline rig is more portable, more easily moved. If you have got a bucket line dredge, it is part of the boat, and it is a great big, cumbersome outfit, and these things are detachable—here is a photograph of the plant we have on the Feather River, if you would like to look at it (handing photograph to Mr. McMillan).

Q. Yes; I think his Honor would like to look at it (handing photograph to the Court).

I will ask it be received in evidence as illustrative of the witness' testimony.

The Court: Admitted. [191]

(The photograph referred to was received in evidence and marked U. S. Exhibit No. 2.)

The Witness: The bucket line dredge is a part of the boat, and it is a great, big, cumbersome affair. The dragline is separate from the boat, and you can move around, and you can prepare for high water very much more easily than you can with the bucket line boat. There are one or two bucket line boats that are lying along this river above there that were swept away by high water. They were caught before they could get ready for the high water. But with the dragline rig you can always provide protection for your boat, keep it up next to the bank, and the dragline can always scramble ashore if you have to. The dragline rig is the one I have found to be the most

(Testimony of Ernest A. Wiltsee.)

practicable in river dredging, and I have had over 40 years' experience.

Mr. Cornish: May it please your Honor, I forgot to ask Mr. Wiltsee one question. In regard to the permission to go on the property and drill these holes, he spoke to me during the recess and told me he wanted to straighten it out in his testimony.

Q. You testified this morning that Mr. Stanley had given you permission to go on the property and drill these test holes. You wanted to explain that?

A. I do. I said I had Mr. Stanley's permission. Here is what happened: I had Mr. Morrison's permission to go in there, and then I learned that the Government had either condemned it, or had an option on it, or something, so knowing Mr. Stanley, I called him up and said, "Stanley, I have a drill ready; I want to go over there and drill that Spanish Bar. How about it?"

He said, "I don't give a damn."

So I said, "All right, I will go ahead."

That is exactly the conversation that took place.

The Court: Quite positive language.

The Witness: Yes. I thought it meant that I could go ahead, so I went ahead.

Mr. McMillan: Q. Mr. Wiltsee, there was some testimony here this morning about some equipment, some sort of a suction method of recovery. Have you heard of that?

A. Yes. I have seen and heard of suction dredges all over this country for the last 40 years, ever since I have been here.

(Testimony of Ernest A. Wiltsee.)

Q. And they don't amount to much in your opinion?

A. And there was never one of them that was a success, to my personal knowledge, Mr. McMillan, and I think I know. I have seen 35 or 40 of them.

Mr. McMillan: What was the name of the particular one you had this morning, Mr. Cornish?

Mr. Cornish: No particular name. It was Mr. Mead's equipment.

Mr. McMillan: Q. Do you know anything about that?

A. No. They are all right when you are working in the bed and handling mud and that sort of thing, but you have to recover gold, and gold is heavier than mud; it is heavier than quartz; and you have to have something that is more positive than suction, I think. And when you got down to bedrock I think they would have trouble with those boulders. This may be all right, I don't know, but at least I have never seen a successful one yet. I have seen a lot of failures. I am not going to say this is not successful. It may be entirely different from all the others.

Q. That is, it may become so some day?

A. I beg your pardon?

Q. It may become so some day? A. Yes.

Q. Mr. Wiltsee, I didn't get it clear in my mind this morning— [193] in making those tests up there, you used a drill method?

A. We used a churn drill, just like they use in a water wheel, and the reason we use a churn drill is because those churn drills have been proven to be

(Testimony of Ernest A. Wiltsee.)

the most reliable tools for prospecting for dredging that have been devised since I have been in this business, and I only went into this business in 1900, and we know from our records and the companies in California using the churn drills—and they are almost always the same size, No. 3 Keystone is the standard—the results of their operations during all these years in which the dredging companies have been working have showed those results are reliable, and that is why we have used them. We have standardized our drilling methods; we always use the same sort of drill and the same method of handling it.

Q. Well, that method of drilling holes you used in drilling the holes in this property there, from your experience that is as satisfactory and as approved a method as can be found? A. Yes.

Q. Now, did I understand you to say, Mr. Wiltsee, that if you went in there you would go in there with your three-yard equipment?

A. I would use two rigs. I would use the three-yard rig on the upper end, because that is shallower, and I would use the five-yard equipment on the lower end, because that is deeper. You see, that five-yard equipment can dig down to 55 feet without any trouble.

Q. That equipment costs money, doesn't it?

A. The equipment we have at Oroville cost \$155,000.

Q. The two equipments?

A. The dragline and the boat and the mechanical equipment we have up there cost \$155,000. Of course,

(Testimony of Ernest A. Wiltsee.)

you wouldn't need all that on the American. We had a [194] contract with the city there to build the levees higher and wider up there, and we built the levees 140 feet wide and six feet higher than the regular levees, and we had to use a bull-dozer to handle the boulders and the work on the levees, because there was a lot of boulders up there. That is a much larger stream than the Middle Fork of the American.

Q. Well, you wouldn't advise anyone to go on that property with any lighter equipment?

A. No, nothing less than three-yard equipment.

Q. As I understand it, Mr. Wiltsee, you have options on pretty near all the claims on the Middle Fork of the American?

A. I have everything tied up above and below Mr. Miedel's property. I have \$20,000 up in advance to hold them.

Q. Yes. Well, owning all this equipment, and owning options on all these pieces of property, under those circumstances you wouldn't be running a very great risk as to whether you could profitably mine it?

A. You mean I would be running a risk?

Q. I mean,—I have this thought in mind: It is not clear in my mind. If you didn't have all this equipment and all these options on other mines up there——. You know this piece of property. Would you want to go in on this piece of property alone and buy machinery just for this piece of property?

A. I would rather not; I would rather have the rest.

(Testimony of Ernest A. Wiltsee.)

Q. You what?

A. I would rather have the rest. You are going to ask me if I would go in on that alone?

Q. No. It could be mined more profitably——

A. Much more profitably having these others.

Q. Yes. I was examining those drill holes. I see one there, I think it is marked—what is the number of that, D or B—I [195] think that you will recognize it; it went down to 16 or 18 feet, somewhere around there, and it ran \$3.00.

A. It did, yes.

Q. That is a pretty hot hole, is it?

A. Yes. In my mind, I never averaged that hole in fully. You see, the other holes averaged just under 25 cents, and I didn't think, under the laws of average and my experience in this business, that I could put that hole in there and count it all the way, but I think it will go 35 cents through the influence of that hole.

Q. But you, yourself, with your experience, you would throw that hole out?

A. I don't know that I would throw it out entirely, but I wouldn't put it in entirely.

Q. As soon as you saw something like that, I imagine that a gentleman of your experience would say, "Let's dig some other holes around here," wouldn't he?

A. There was another hole down on Green's property that ran over \$2.00, and I dug some other holes around it, but not on this property.

Q. Well, that would be your practice, wouldn't it?

A. Usually would.

(Testimony of Ernest A. Wiltsee.)

Q. It would, is that not true?

A. As high as that?

Q. Yes.

A. Well, you usually—when we drilled at Oroville, we had one hole that ran well over \$3.00, and we never gave that full value—you understand what I mean—I didn't throw it out, but I didn't include it entirely. But if you are asking me what this property would go, I am positive it will go 25 cents, and I believe it will go 33 to 35 cents.

Q. That is, all of the property?

A. No; I am talking about Mr. Miedel's property.

Q. Well, I am talking about Mr. Miedel's property, too. That is the one we have under consideration here.

A. That is the one I am talking about; not about the others. I [196] know it will go 25 cents, and I believe it will go 33 to 35 cents through the influence of that hole.

Q. Take that property, did you have occasion to make a survey to establish the cubic yardage of workable gravel?

A. Yes.

Q. What was that?

A. Well, 600,000 cubic yards, and maybe a little more, according to our measured survey.

Q. Well, as a result of those tests made, and averaging them up, and your experience that you have had all these years, and knowing that yardage, what do you think that property would go? What would be the average?

A. The average value of the property?

(Testimony of Ernest A. Wiltsee.)

Q. Yes.

A. Oh, I think it would dredge from 33 to 35 cents a yard, and 600,000 yards would be—well, that is about \$200,000.

Q. Then what did you say the cost was of dredging operations of that kind?

A. Well, that dredging operation?

Q. Yes.

A. About 12 cents a yard.

Q. Twelve cents a yard? A. Yes.

Mr. McMillan: I think that is all, Mr. Wiltsee.

Mr. Cornish: That is all, Mr. Wiltsee.

(Witness excused.)

Mr. Cornish: May it please your Honor, I desire to be sworn and testify concerning certain negotiations leading up to the filing of the answer, negotiations between Mr. Miedel and his representatives, and representatives of the United States Engineers and the United States Attorney.

FRANCIS T. CORNISH,

called for the Defendants; sworn.

Direct Examination

The Witness: My name is Francis T. Cornish,— [197]

Mr. McMillan: May it please your Honor, I am at a loss to see the relevancy of this testimony, or

(Testimony of Francis T. Cornish.)

its competency. These negotiations leading up to the filing of the complaint—they were never consummated to the extent that they entered into an agreement—and these negotiations that they talk about after the condemnation suit was filed have no relevancy. We are here concerned with a condemnation suit.

I have never objected to it before, because a lawyer is—in a case of this kind a lawyer is always in an awkward position. The Court wants to get a full, elaborate picture of everything. But I believe your Honor has a full picture of all these negotiations since that time. We are trying a condemnation suit; we are not trying negotiations between parties that never resulted in an agreement. And those negotiations, your Honor knows what they were already. It is a matter of time-consuming process in giving testimony that I am concerned with now. As I say, I never objected to it before, but for the life of me I can't see the relevancy. However, it is all in now, and if your Honor is not concerned about taking what, in my opinion, is merely time-consuming testimony, Mr. Cornish might go ahead.

Mr. Cornish: If I might step down from the stand a moment, your Honor.

The Court: Yes.

(Whereupon Mr. Cornish left the witness stand and stood at the lectern.)

Mr. Cornish: In Mr. McMillan's opening state-

(Testimony of Francis T. Cornish.)

ment he has referred to the fact that an answer was not filed in this case until March, 1941, although the suit was filed in October, 1941. It is the purpose of this testimony to show by documentary evidence that in the preliminary negotiations with the United [198] States Government, when Mr. Miedel and his associates were asked to place a price upon the gravel, that at first written offers were submitted to the Government based upon a royalty basis, whereby the Government would pay only for that gravel which the Government actually took out, and would pay on a percentage, depending upon the place where the gravel was taken; that in those offers a proposition was submitted whereby the price that was paid would be dependent upon the gold recovery, so that if the gold recovery reached a certain point the gravel would be free to the United States; that this proposition was turned down, and other propositions were made based upon a royalty basis; that in the negotiations with the United States Government it was explained to the Government——

Mr. McMillan: May it please your Honor, counsel is in a dual capacity here. He was sworn as a witness——

Mr. Cornish: I am making an offer of proof. I stepped down from the stand, Mr. McMillan, because you made an objection. I am not at this time testifying.

(Testimony of Francis T. Cornish.)

Mr. McMillan: You are simply making an offer of proof?

Mr. Cornish: Simply making an offer of proof.

If your Honor understood this was testimony, there is no intention of it being so considered.

(Continuing) ——that the explanation was made to the then United States Attorney, now Judge Hjelm——

Mr. McMillan: Pardon me for interrupting, your Honor. I was concerned about the whole thing being time-consuming. If your Honor wants to hear the testimony, well and good. Now, this is just as time-consuming now, in the nature of things,—in fact, more time-consuming. If your Honor wants to hear the testimony, counsel might as well resume the stand. [199]

Mr. Cornish: Well, you objected, and I came down from the stand to explain the purpose of this testimony.

It is our purpose to show that the United States wanted to pay a cash sum, rather than paying for the amount of gravel actually removed; that the United States offered to do certain things in consideration of having this placed on a cash figure, because the United States didn't want to limit itself as to whether, or how deep, or as to the quantity of gravel they would take; and that even after the landslide, and even after they abandoned the property, when the defendants made a request for permission to go on the property, to disregard the order for exclusive possession and allow the de-

(Testimony of Francis T. Cornish.)

defendants to go on the property and mine the property, that written request made to the United States Attorney for permission to mine the property remained unanswered; that then the proposed answer of the defendants was taken to the United States Attorney's office, and the United States Attorney was told that unless we had some definite commitment as to when this work was going ahead, it would be necessary for us to file the answer; that the answer was withheld in the first instance because the inducement was made first, that Washington had to confirm the deal; and second, that the landslide had upset the matter so that they didn't know on what basis they would go through; third, it was thought that negotiations might be made by the Government to permit Mr. Miedel and his associates to enter upon the property and mine it; and finally, they were unable, a year and a half after the condemnation suit started, to get any definite commitment from the Government as to what their stand was, and the answer was filed.

Now, Mr. McMillan has criticized the taking of a year and a half to file the answer, and it is merely to corroborate the [200] testimony the witnesses have already given——

Mr. McMillan: May I interrupt to say I don't believe that Mr. McMillan criticized. I simply referred to that as a significant fact, that the delay was caused by these title matters and other matters. I simply put it in the form of explanation of a delay for reasons I thought substantial.

(Testimony of Francis T. Cornish.)

Mr. Cornish: I wish to show, your Honor, that the title had nothing to do with it; that since August 14, 1940, efforts were made to work out some sort of a commitment, and that finally it was necessary to file the answer in May, 1941.

Now, that is the purpose of that testimony, your Honor.

I believe it is relevant, because it certainly shows the right that the United States Government sought to acquire, which was not to pay so much a yard for the gravel they took, but to have a free reign to take any gravel they might see fit to take from any place on the bar they might see fit to take and at any depth in the bar they might see fit to take. In other words, the United States Government preferred to pay a full cash price, rather than so much a yard for the gravel they took.

I believe that is material from that standpoint, your Honor, and that is the purpose of offering the testimony, and I believe the testimony will substantiate it.

Mr. McMillan: May it please your Honor, the whole matter under consideration here—it is conceded we were in possession for one year and eleven months of the easement that we took; that we sought to abandon the proceeding finally, but were denied that right. But we did give notice of abandonment one year and eleven months after the suit was filed, and they have had the property since that time.

Now, the whole consideration before the Court

(Testimony of Francis T. Cornish.)

is this: It is [201] conceded they were kept out of the use and occupancy of that property for one year and eleven months. Now, because they were kept out of the use and occupancy of those premises for one year and eleven months, the whole thing with which we are concerned here is what is the just compensation to be paid the defendants for that use and occupancy for one year and eleven months?

We are not trying negotiations. Because after a complaint is filed and counsel comes in and talks about negotiations, unconsummated negotiations, that certainly wouldn't be the basis of a lawsuit. They are coming in now in this particular instance just like they would go in a court of claims and seek damages for the use and occupancy of the premises for a definite time, one year and eleven months. What else can there be, may it please your Honor? Certainly they are not trying to seek exemplary damages from the Government. It is the value of the use and occupancy of the premises for one year and eleven months that is before the Court now, and that there were negotiations up to that time, or negotiations after that, whether there was good faith or bad faith, are not questions before your Honor. The question before your Honor now is, having conceded we were in the use and occupancy of those premises for one year and eleven months, what is the value of that, and what was their loss by reason of that? That is what is before the Court, and all these matters he wants

(Testimony of Francis T. Cornish.)

to show are purely irrelevant, in my humble judgment, and I have always understood that they were, but, as I said, I was in an awkward position, I didn't desire that anything be taken from the Court in order that the Court have a full picture of the matter, but I think that the Court has the full picture now, and I submit my objection that these matters are utterly incompetent, irrelevant and immaterial. [202]

Mr. Cornish: May it please your Honor, it is true, as Mr. McMillan says, that the damages to the defendant by reason of the deprivation of use of their property are material. There is no question about that. But Mr. McMillan omits, in his argument, that instead of condemning anything tangible, the Government condemned an incorporeal right, that is, the right to take gravel. They didn't want to limit themselves as to the amount that they would take; they didn't want to limit themselves as to the location at which they would take it, or the depth they would go. In other words, in addition to excluding the defendants from the possession of the property, they sought the right to take whatever gravel they might see fit to take.

These conditions, which are incorporated in the complaint, your Honor, and which I have read, were conditions which were thrown about the taking in order to, as best as the parties were able to work it out together, safeguard the rights of the defendants in the gold as distinguished from the gravel, so that no matter how deep the contractor went,

(Testimony of Francis T. Cornish.)

and no matter where the contractor took the gravel, that the gold, whether little or much, would belong to, be the property of, and retained by the defendants, and to that extent minimize the damage of the defendants by reason of being excluded from the privilege of mining this property as a mining proposition, and not as an adjunct to a stationary gravel plant.

Now, while it is true that the United States Government did file an abandonment on the 13th of September, 1941, the United States Government abandoned a right which it had for a year and eleven months. They did not abandon anything tangible; they abandoned an incorporeal right. They could have abandoned this piece of property, had they condemned the property; had they [203] sought to take the property.

Had they condemned 100,000 yards out of the total amount of gravel on the property, they could have abandoned that, because they never took it. But rather than condemning anything tangible they condemned an incorporeal right.

Now, it is my contention that the cost, the value of the right which the Government condemned, must be determined as of the time the Government went into possession.

Now, what your Honor's test is going to be, whether it is going to be based upon the assumption that the Government would take 100,000 cubic yards of bank run; whether it is going to be based on the assumption that the Government might wish

(Testimony of Francis T. Cornish.)

to pave the roads, and take 200,000 cubic yards of bank run; or whether it is going to be based on the assumption that the Government had the right to use the whole bar if they saw fit, I cannot say at this time, but it is our contention that in that consideration the damages of the defendants by reason of that taking are material, because in taking that right the Government was going to do certain things: They were going to furnish all the water that they felt was necessary to wash this gravel; they were going to furnish all the power that they felt was necessary to operate the concentrating devices; they were going to dig all the gravel that they felt was necessary to dig, and raise it to a certain elevation, at a point where it could be carried through these concentrating devices by force of gravity and without mechanical means. That was the value on which the Government sought to condemn this property, and Mr. Miedel and Mr. Morrison stated—Mr. Miedel stated that they shook hands on this deal, because they considered that all these considerations, the digging of the gravel, the carrying away of the tailings, the furnishing of the power and furnishing of the water, was of value to them. In other words, they contemplated in the sale of the gravel, your Honor, they contemplated the reservation of the gold.

In the negotiations with the United States Engineers, the testimony will show if we are permitted to establish it, that we asked the Government to put in the devices that were necessary in order to

(Testimony of Francis T. Cornish.)

save this gold, devices along the lines that the defendants were to design in advance, and permit the contractor to have these devices, and when the project was over the Government could have the salvage and the defendants would take the gold. All the Government had to do was to make adequate provisions for the recovery of the gold satisfactory to the defendants, and they could have the gravel for nothing.

The United States Engineers replied they weren't in the gravel business; that this was a contractor coming in to handle the gravel; and this contractor could be required to furnish power; required to furnish water; required to elevate the gravel; but he could not be required to actually extract the gold from that gravel once he had separated it from the bar. And the defendants were asked to place, as a cash consideration for their consent for taking this gravel, that amount of money which they felt would be adequate to permit them to furnish gravel concentrating devices, rather than the Government to furnish them, so the Government would not be in the mining business. So far as the Government was concerned, they wanted the right to go in there and take whatever they saw fit to take, and the cash value of that right is a value that must be determined as of the time the Government took it.

Now, I realize it is an ironic situation to say that the Government must pay for something which they never took. If the [205] Government was

(Testimony of Francis T. Cornish.)

buying gravel, to say that the Government must pay for gravel when they didn't have gravel is not right. But the Government wasn't taking gravel; they were taking a right, a right to take gravel if they saw fit to do it, and contemplating that this project would go ahead the defendants were willing to delay their mining operations long enough to permit the Government to complete that project, providing that arrangements were made for them to get the gold.

I don't say that the United States Government have not acted in good faith. I don't say that if you take a thing up with the United States Attorney or the U. S. Engineers, that they don't have the final say, but we do say that the Government sought to take a right as distinguished from anything tangible. That is the purpose of the testimony, your Honor.

We will show the final offer which was made to the Government, which consisted of two letters written by myself to Judge Hjelm, in which we outlined the conditions, and that those conditions that we outlined were never accepted by the Government—tentatively, yes, but so far as we were advised, they never met with the approval of the authorities in Washington, and that consequently no money was ever paid over; that even after the contractor had started in to operations, even after he had taken possession and contemplated putting in his gravel plant, that efforts were made to procure some sort of commitment from the United

(Testimony of Francis T. Cornish.)

States as to whether it would go ahead on this basis, because the defendants were placed in a position where they didn't know, five months after this suit was filed, they didn't know on February 28, 1940, when the landslide at the site of the dam occurred, they didn't know at that time if Washington would approve this sort of a deal; they didn't know whether they were [206] safe in buying special equipment they would need with a stationary plant, or whether the United States would elect to take, under the option, the gravel and the gold, or whether the United States would elect to take the gravel and recover the gold—which would mean a wrangle with the United States as to whether we were getting all the gold or the contractors were keeping some of it as it went over the devices.

I realize this is a peculiar case. It is not like the ordinary condemnation suit, where they take an easement to travel over the property. If all they took was an easement for a power line, or an easement for a road, it would be easy to determine the value of the use of that property. But when they take a right to remove minerals, which, in law, as your Honor knows, is not called an easement at all, as the complaint calls it, but it has a very definite concept in the law, namely, a profit; namely, the right to remove minerals or anything else from the ground and appropriate it to your own uses. That is the very situation we have——

Mr. McMillan: May it please your Honor, is

(Testimony of Francis T. Cornish.)

counsel going into an argument on the entire case? I made an objection that the testimony he offered to give here was irrelevant, and I again repeat the reasons in short, your Honor: It is very much like—all oral negotiations between parties are superseded by a written instrument; that is, that written instrument, if the terms are within the four corners of the plans, supersedes the oral negotiations in the absence of any fraud.

Now, these negotiations were had, but what happened? A complaint was filed in eminent domain, and certain things took place afterwards. Counsel speaks of the rights we were going to take, the gravel we were going to take, the uses we were going to [207] make of the property. Now, it must be obvious to your Honor that we never took any of those things. We never took any gravel, we never took any gold, we never took anything. What negotiations were had as to how much water was to be furnished, how much electricity was to be furnished, and what Mr. Miedel said to Mr. Hjelm, and what Mr. Hjelm said to Mr. Miedel, and “we shook hands on it”—we are not trying handshakes here, your Honor; we are not trying negotiations that were never consummated. We are trying a condemnation suit. We had the use and occupancy of a piece of property for one year and eleven months——

The Court: The Court is ready to rule. The objection is sustained.

Mr. Cornish: Mr. McMillan, have you in your

(Testimony of Francis T. Cornish.)

possession a letter from myself to Judge Hjelm dated May 22, 1939?

Mr. McMillan: I haven't it right here, but I will search around here.

Mr. Martin, or Mr. Seawell,——

Mr. Cornish: I would like to offer it in evidence.

Mr. McMillan: Mr. Foley has well suggested that it may run counter to the ruling which the Court has already made. Is it something admissible notwithstanding the ruling of the Court?

Mr. Cornish: I believe so.

Mr. McMillan: What do you seek to show by this document? Of course, if we have it, we will find it. We have this file here, and you realize I came into this case long after the landslide, even——

Mr. Cornish: I realize that, Mr. McMillan.

Mr. McMillan (continuing): ——but if you will state to the Court——

Mr. Cornish: The document I desire to offer, your Honor, [208] consists of three letters; one is a letter dated May 27th, to the Honorable G. B. Hjelm, United States Attorney, Sacramento, offering an assignable option to take sand and gravel, exclusive of free metallic mineral content, from the property, subject to certain conditions, which letter was acknowledged by Mr. Hjelm under date of June 10th, stating that certain conditions were feasible, and that certain conditions therein stated were not feasible, and culminating in a letter to Judge Hjelm under date of June 14, 1939, in which

(Testimony of Francis T. Cornish.)

the suggestions of Judge Hjelm were in part approved and in part disapproved, and it is the contention of the defendants that those three letters define the right which the Government sought to condemn, that the specifications in the complaint were drawn pursuant to these three letters, and that it was the desire of the Government not to condemn gravel as gravel, but to condemn the right to recover gravel, to remove gravel, as distinguished from the tangible thing itself.

Now, those three letters, your Honor, give the background of, and the explanation of, the peculiar situation which appears in this complaint on pages 4, 4-A, and 4-B, the things which the defendants had a right to do in order to protect their rights, subject to which the condemnation was taken.

Mr. McMillan: We respectfully submit, may it please your Honor, it is squarely within the ruling of the Court. I am at a loss to understand on what theory counsel thinks letters of this character are admissible. If negotiations are carried on for a long time between parties—for example, seeking to purchase property by direct purchase, and we have in mind this property and that property, and changes may come about, or they may not come about, and finally, for reasons, good reasons, an action in eminent domain is filed. Is it possible in a condemnation [209] proceeding—laying aside the nature of this proceeding, which is not altogether a condemnation proceeding; it is to assess damages for use and occupancy—but in another

(Testimony of Francis T. Cornish.)

relative proceeding, is it possible we are going back in a condemnation suit ordinarily and say "You shouldn't have condemned this property, you shouldn't have taken so many lots; the descriptions of the lots when we were discussing them and trying to get them by direct acquisition was thus and so; you were to do this and you were to do that, and we were to do this and we were to do that in the matter"? Are we concerned here with a negotiation and discussions? No; we are one step beyond the negotiation stage; we are one step beyond the discussion stage. A condemnation suit was brought, in which it was sought to take certain things, to have certain uses, to have an easement.

Now, none of those uses took place except we remained in occupation and use of this property for one year and eleven months.

Now, what was the damage suffered by the defendants by reason of our use and occupation of this property for one year and eleven months? That is the issue here. What was the value? What was the loss to defendants because we were in possession of that property?

Let us assume we were in possession of the whole of their property during that time. Assume we kept them out of the use and occupancy of their property during that time. Now, they contend they could not mine the property. Now, whether or not they could have mined the property, or would have mined the property, we contend, is highly conjectural and speculative, and in that respect the taking

(Testimony of Francis T. Cornish.)

did not amount to appropriation; it only amounted to frustration, as I pointed out the other day. [210]

We state they are entitled to the value of the use and occupancy of that property for one year and eleven months. We took no gravel, and we took no gold, and they still have both, and it is just as easy to mine that property profitably after the war as it was at that time.

That is what we are determining here, that issue, —What was the value of the use and occupancy of that property for one year and eleven months? And I repeat my objection to this offered testimony.

The Court: The objection is sustained.

Mr. Cornish: May I state, your Honor, I can't agree with Mr. McMillan that the only issue involved is the value of the use and occupancy?

Mr. McMillan keeps talking about the Government taking gravel. My point is these letters will show that the Government wasn't taking gravel; the Government was taking a right, as distinguished from a physical thing itself; that the Government didn't desire to take any tangible gravel from any particular place, but that the Government wanted a right to go in there and take gravel as distinguished from the physical gravel itself.

Now, if you have a right to do something, if you have a right to walk up and down the halls of this corridor for two years, and you never walk up and down the halls of this corridor for a year and eleven months, how can you turn back that

(Testimony of Francis T. Cornish.)

right? How can you say because you never exercised that right that you didn't have that right, and that right was worth something to you?

Now, it is our contention that you must distinguish between the physical gravel itself and the right to take the gravel, because without this right the Government would have been subject to a breach of contract suit with its contractor on the project, [211] because they agreed with the contractor that he could take gravel on this property, have the right to come in on this property and take gravel. Even before this condemnation suit was filed they had made a contract with the contractor that he could come in on this property, without cost to the contractor except the cost of his machinery and the cost of operating it; that the contractor himself was paying nothing for this gravel. That meant that the Government, on the basis of that, was able to let a contract to a contractor for a lesser figure, because the contractor knew that he didn't have to go out and buy the gravel; that the gravel in place would be furnished to him. And in this condemnation they weren't asking for anything tangible, but a right to protect themselves, to save themselves from a breach of contract suit by the contractor with whom they had already agreed could come in on the property, and at the time that they made that agreement they had no right to come in on the property and take gravel.

Perhaps I am wrong in my presentation, perhaps I didn't make myself clear that the Govern-

(Testimony of Francis T. Cornish.)

ment was not condemning anything tangible, but they were condemning a right they had to have in order to protect themselves against a breach of contract suit by their contractor. They didn't know what they were going to take; they didn't know what their contractor was going to take. It isn't like the United States Engineers were going in on this property. They were turning it over to the contractor to use in whatever manner he saw fit to use it. They didn't know that he would use only approximately 75,000 cubic yards——

Mr. McMillan: May I interrupt again, may it please your Honor? Is counsel contending that this condemnation suit was brought to protect the Government against the contractor?

Mr. Cornish: I am contending that at the time this [212] condemnation suit was filed this contract had been let to Mr. Pollock——

Mr. McMillan: And that we brought this suit to protect ourselves against Mr. Pollock?

Mr. Cornish: You brought the condemnation suit to comply with your contract with Mr. Pollock, your contractor.

May it please your Honor, at the time this condemnation suit was filed the Government was under no obligation to provide any gravel for this dam. The Government had merely let a contract to Mr. Pollock, and in fixing the price at which he would do this work had made an agreement with Mr. Pollock that he could come on the property and get gravel without any cost other than the cost of refining the gold.

(Testimony of Francis T. Cornish.)

The Court: The Court has ruled.

Mr. Cornish: The defendants rest.

(Defendants rest)

Mr. McMillan: Is that the defendants' case?

Mr. Cornish: It is.

Mr. McMillan: May it please your Honor, it is close to the hour of recess——

The Court: Yes; we will take a ten-minute recess.

(Recess.)

Mr. Cornish: May it please your Honor, after closing, the thought occurred to me that we didn't offer in evidence the leases which are attached to the answer, and I understand that Mr. McMillan will stipulate that those leases may be offered in evidence for the purpose of defining the rights of the respective defendants in the property.

Mr. McMillan: Not for the purpose of defining any rights of [213] the defendants, they are a part of the answer, may it please your Honor, and they may be offered in evidence, and there is no objection to their being introduced in evidence, but they will speak for themselves.

Mr. Cornish: Yes, that is satisfactory, your Honor.

The Court: Yes; so ordered.

(The leases referred to were attached to the Answer.)

Mr. McMillan: Mr. Fraser.

(Whereupon Mr. McMillan exhibited a document to Mr. Cornish.)

Mr. Cornish: If you want to offer that in evidence, Mr. McMillan, tell me what the tests show and I will stipulate——

Mr. McMillan: Mr. Cornish, I thank you very much, but these gentlemen, these experts, can give the Court better information than I can. I will try to make it brief.

Mr. Cornish: All right.

Mr. McMillan: Thank you, but I would prefer to have the witness explain it.

JAMES B. FRASER,

called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Mr. James B. Fraser?

A. Yes, sir.

Q. And what is your position?

A. At present I am associate engineer, U. S. Engineer Office.

Q. Stationed at Sacramento?

A. Stationed at Sacramento.

Q. And how long have you been so occupied?

A. Well, I have been with them since February 7, 1918.

(Testimony of James B. Fraser.)

Q. I will show you here a map or drawing, and I wish you would just tell the Court and the rest of us what this purports to be [214] (exhibiting document to the witness).

A. Well, that is a survey we made in August, beginning the 27th, up to about the 1st of September, of what is known as Cherokee Bar.

Q. Well, that is the property here under consideration, isn't it? A. Yes, sir.

Q. And it reads on this map, "Boundary Survey and Contour Map of Cherokee Bar, Located on the Middle Fork of the American River, in one drawing, Scale 1"—

A. One inch equals 200 feet.

Q. 100 feet, isn't it? A. Yes, 100 feet.

Q. "U. S. Engineer Office, Sacramento, California, September, 1942. Approval recommended. V. L. Glaze, Senior Engineer." And what is this name (indicating)—"H. M."— A. Reich.

Q. "Reich"—"Head Engineer." What is this name down here (indicating)?

A. I don't know.

Q. Well, that is not a matter of great importance at this time. Mr. V. L. Glaze, he is the senior engineer, and he directed that this map be made?

A. Yes.

Q. This work be done? A. Yes.

Q. This survey? A. Yes.

Q. Now, tell us in detail what this survey is. When did you go up there and what did you do?

A. Well, we went up there on the 27th of

(Testimony of James B. Fraser.)

August for the location of the cross-sections of the contours and location of the test holes that had already been put in.

Q. What kind of test holes? For what?

A. Well, I understand they were put in by Mr. Bishop's orders, for the location— [215]

Q. How many test holes?

A. Well, there were eight, I think.

Q. Well, aren't there nine?

A. Nine, yes, sir.

Q. What other information is shown on that map?

A. Well, just the river and the bars.

Q. What river? A. The American River.

Q. Middle Fork, isn't it?

A. Middle Fork of the American River, yes.

Q. Now, was a survey made there to show the amount of gravel?

A. That is what it was for; the cross-sections was for that, the exposed gravels on the bar.

Q. Well, just tell us how that was made and what was done in connection with its making. In other words, describe it fully, so that the Court will understand it—the Court will understand it, I know, much better than I can, however.

A. We started from the section—

The Court: Place it on the blackboard.

Mr. McMillan: Have you any objection to this being introduced?

Mr. Cornish: No.

Mr. McMillan: It may be introduced in evi-

(Testimony of James B. Fraser.)

dence, then, as the Government's exhibit next in order.

The Court: Admitted.

(The map referred to was received in evidence and marked U. S. Exhibit No. 3.)

Mr. Cornish: Mr. McMillan, what is the bearing and distance of the south boundary of that property.

Mr. McMillan: Mr. Cornish, Mr. Fraser will tell you all about that. He knows more than I do, I am sure of that.

Q. Now, will you please answer Mr. Cornish's question, Mr. Fraser?

A. The bearing was south 89, 55 west; and the distance I don't [216] exactly see on here. When we run into the slide we didn't try to establish any corners of the property. Our sole purpose of the survey at that time was to locate the test holes, cross-section the bar, and get the bends and the yardage.

Q. Go ahead, please, and tell us——

A. Well, we started on this corner (indicating), and went on a bearing——

Q. Which corner?

A. From this section corner up in here (indicating), triangulated down on this bar; chained back 200 feet to our triangulation point; ran a chain of transverse up along the top of the bar; then ran levels over and from these stations along here (indicating); we cross-sectioned from our lines across the bar, across the river to the opposite west bank, and in the same way we cross-sectioned

(Testimony of James B. Fraser.)

to the toe of the hill on the left bank—east bank—we did that every hundred feet. And then on the west bank, for our sections, we angled and crossed for the cross-sections, and where we didn't hit the bank we took stadia shots to determine the curvature of the bank on the other side. Then from here (indicating), we got the test holes, took levels on the tops of them so they could be plotted.

Q. Does that map undertake to give a survey of the acreage of workable gravel?

A. I would say it would, yes.

Q. Well, does it? A. Yes, sir.

Q. And as computed under that survey, how many cubic yards of exposed workable gravel?

A. Yes, that was computed, but not under my—I don't know about the yardage, how much I computed.

Q. Isn't it 535,000 cubic yards?

A. That is what I understand it was.

Q. It is not shown on there?

A. No, I don't see it on [217] this map.

Q. Now, those test pits are located on that map? A. Yes.

Q. All nine of them? A. Yes, sir.

Q. And there is shown on the map the results of the tests made, is that correct? A. Yes.

Q. Does it show alongside the test pits the log of the tests? A. No, they don't.

Mr. McMillan: I think the other day you tried to get some information, Mr. Cornish. It wasn't

(Testimony of James B. Fraser.)

clear in my mind what you wanted to get. Maybe you can clear it up by asking this gentleman now.

Mr. Cornish: May it please your Honor, I merely called to Mr. McMillan's attention, when he offered the first diagram, that a question was raised as to whether the west boundary of the river was correctly shown, or was estimated, and your Honor will recall on the drawing which is behind this——

Mr. McMillan: Well, that was just put in there as a vicinity map, and was just to give His Honor a general idea of where the property was.

Mr. Cornish: In other words, Mr. McMillan, you are satisfied that both banks of the river are on this property, and that the river does not extend over, as shown on the original drawing?

Mr. McMillan: That is correct. And are you satisfied that this drawing here correctly represents the area of workable gravel?

Mr. Cornish: Well, each one I see is a little bit different.

Mr. McMillan: We don't intend to offer any more——

Mr. Cornish: I can't object to the witness testifying that that is the way it looked to him, but it doesn't exactly [218] correspond to our survey. I think every one of the surveys up there are a little different, may it please your Honor.

Mr. McMillan: Are you willing to accept that?

Mr. Cornish: I would like to question the witness about it a little, first.

(Testimony of James B. Fraser.)

Mr. McMillan: Very well.

Mr. Cornish: Q. Mr. Fraser, in surveying this property, did you find any of the test holes on the bar to the west of the river?

A. The only ones we found were those that we have located there on the map.

Q. And those would be the test holes that are marked "Test Hole 1," "Test Hole 2," "Test Hole 3," "Test Hole 4," "Test Hole 6," "Test Hole 7," "Test Hole 8," "Test Hole 9"?

A. Yes, sir.

Q. I take it on this survey you surveyed the river with reference to its position on the 80 acres—or 40 acres?

A. No; we surveyed the river in reference to the bars. In other words, we didn't try to lay out any section lines, or anything like that, or any property corners; we just made a direct survey of the bar.

Q. In other words, so far as you know, this south boundary might be down a ways or up a ways?

A. It could be, yes.

Q. And the north boundary might be further south or further north?

A. Or further north, yes.

Q. And actually what you were doing was not trying to place the bar with reference to its position on the 80 acres?

A. No, sir.

Mr. McMillan: Forty acres, isn't it?

Mr. Cornish: Forty, yes.

Mr. McMillan: 40.34.

(Testimony of James B. Fraser.)

Mr. Cornish: Q. But merely to measure the size of the bar [219] and show on the map which you made the amount of gravel in that bar?

A. Yes.

Q. And that survey, Mr. Fraser, was directed to that portion on the inside of the bend, and didn't apply to the portion on the west side?

A. No, it cross-sectioned the bar on the west side, both.

Q. You included—now, how much of the bar on the west side did you include in this estimate of 537,000 cubic yards?

A. Well, I didn't work it up, but I assume the whole bar was taken in.

Q. Well, Mr. Fraser, if you didn't accurately fix the north and south boundaries of the east half of the west half of the southeast quarter, how can you tell that your computation of gravel in the west bar was accurate?

A. Well, that I couldn't say, because we have that one corner to start from, and I understood at that time that there was some dispute about these corners around up there (indicating), so we didn't try to—we got out far below where the test holes were, and what was apparent to me, the section that they wanted surveyed——

Q. Well, the main section they asked you to survey was the inside of the bend, wasn't it?

A. Well, it was that whole area in there I surveyed.

(Testimony of James B. Fraser.)

Q. Did they ask you to survey the west side of the river? A. Well,—yes.

Q. And do you recall how much gravel you found on the west side of the river and how much you found on the inside bend?

A. No, I don't.

Mr. McMillan: Q. Well, what you were undertaking to do, Mr. Fraser, was this, in brief: was to ascertain there, regardless of corners, the gravel there that was exposed and workable for [220] mining purposes, isn't that it?

A. Yes, sir.

Q. And that survey shows that, and that would be about 18.1 acres, is that correct?

A. About that, yes.

Q. And 527,000 cubic yards?

A. 527,000 cubic yards.

Q. Did you have anything to do with the drilling of the holes? A. No, sir.

Q. When you got through that survey your job was finished? A. Yes, sir.

Mr. McMillan: That is all.

Mr. Cornish: No further questions, your Honor.
(Witness excused.)

Mr. McMillan: Mr. Bishop.

ARTHUR F. BISHOP,

Called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Arthur F. Bishop? A. Yes, sir.

Q. And you are a member of the firm of Bishop & Lord? A. Lord & Bishop.

Q. Oh, Lord & Bishop? A. Yes.

Q. That firm is engaged in what business, Mr. Bishop?

A. We have been in the contracting business, and mining.

Q. By "contracting business," does that have anything to do with dredging or construction?

A. Well, the contracting business has been mainly structures, concrete structures; dams, bridges, and so forth.

Q. You are located here in Sacramento?

A. Yes, sir.

Q. How long have you been in that business?

A. Since 1919.

Q. Have you ever owned, or do you own any dredging outfits now? [221] A. Yes.

Q. How many? A. We own three.

Q. You still have them? A. Yes, sir.

Q. Have you operated dredgers up and down the American River and elsewhere?

A. Yes, sir—not on the American. We haven't been directly in the American, but along the west slope of the Sierras.

Q. Well, tell us, especially for the information

(Testimony of Arthur F. Bishop.)

of His Honor, some of your operations, the extent of your work in mining.

A. Well, we operated near Redding in two locations; on the Feather River above Oroville; up in the vicinity of Slough House in Sacramento County; on the Calaveras River in Calaveras County. That takes in most of them. There are a few more.

Q. How large are the dredgers you own?

A. We own two yard and a half dredgers, what they call dragline dredgers.

Q. Are you familiar with the property here under consideration? A. Yes, sir.

Q. Have you known about it for a long while?

A. Well, just since about a year ago last August.

Q. Have you had any familiarity with comparable property in that neighborhood?

A. Yes.

Q. Other gravel bars and mining claims?

A. Well, south of this is Calaveras County, where we mined, gravel bars similar to it.

Q. Have you been called as an expert witness in other cases for the Government?

A. I appeared in this court one time.

Q. I think you testified not long ago before His Honor in the Smithers case, didn't you?

A. Smithers, yes.

Q. Which was tried here. I call your attention to that survey on [222] the map, Government's

(Testimony of Arthur F. Bishop.)

Exhibit 3. You know about that survey, don't you? A. Yes, sir.

Q. Did you have anything to do with making the test up on the property?

A. Yes; I was requested by the engineers to make arrangements for competent drilling and testing of the bars.

Q. About when was that?

A. That was a year ago last August; that was in 1942.

Q. Will you just proceed and tell us about it, please?

A. Well, after I received the instructions to proceed, I contacted the General Dredging Company of Natomas, California, and arranged with their management to have these drill tests down there with competent men and equipment.

Q. Then what did you do?

A. Well, I didn't do anything—I had nothing to do particularly with the testing myself. I was up there on two different occasions while it was being done, and according to my observation it was handled in the ordinary and competent manner.

Q. Well, you had charge of directing the work, supervising the work?

A. Yes. We—or I spotted the locations of the holes where I thought would be a proper place to get the values and the quantities involved.

Q. Have you ever done work of that kind before? A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. Many times?

A. Quite a number of times, yes, sir, in trying to locate property for our mining projects.

Q. Are those test holes there, test pits, located on that map (indicating), about as you thought they should be located?

A. Well, that is the way I asked them to be dug, yes.

Q. Exactly as you asked them to be located?

A. Yes.

Q. And you know, yourself, that the tests were made? A. Yes, sir. [223]

Q. Who did you have up there with you making the tests?

A. Well, the General Dredging Company had it under charge of Mr. Dorian and Mr. Nicholsan, who did the drilling and were on the ground during the actual work there.

Q. Wasn't there a gentleman up there named Mr. Giddings?

A. Mr. Giddings, who handled the work for the General Dredging Company.

Q. And he was there supervising, too?

A. Yes, he was there more often than I.

Q. And who is Mr. Giddings?

A. Mr. Giddings is one of the owners of the General Dredging Company.

Q. You are familiar with the results of those tests? A. Yes, sir.

Q. You know how each pit ran?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. It is shown there on that survey, is it not?

A. Yes. I have a record of it.

Q. And you have seen the log that was kept?

A. Yes.

Q. And the depths?

A. Yes, I have a record of the depths.

Q. Everything? A. Yes.

Q. As I understand, you are familiar with property up there in that neighborhood?

A. In the locality, yes.

Q. Did you make a particular investigation and examination to determine the market value of this property?

A. In the ordinary way, yes; I determined in my own mind what it would be worth to us.

Q. I will give you a date, now. I will give you the date October 10, 1939. What, in your opinion, as a result of your study and examination of this property, and keeping in mind and taking into consideration as a factor as to enhanced value to determine the [224] highest and most profitable use to which this property might be put in the reasonably near future—I might interrupt to ask you another question: You are familiar with the tests which were made by Mr. Wiltsee?

A. Yes, sir.

Q. That were introduced here today? You have familiarized yourself with those tests?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. You have heard his testimony and know the results of his tests, do you? A. Yes, sir.

Q. Now, keeping that all under consideration, the enhanced value of that property up there by reason of this gold-bearing gravel, basing it upon, if you please, as high as 600,000 cubic yards—in the first place, what would you say is the highest and most profitable use to which that property could be put on October 10, 1939, the date that the summons was issued in this case?

A. Well, I would say dragline dredging.

Q. Mining? A. Yes, dredge mining.

Q. Now, what in your opinion and judgment was the reasonable market value of that property, taking into consideration these tests, the enhanced value, and all the uses to which it could be put, including the most profitable and highest use to which it could be put, its market value on that date?

Mr. Cornish: To which we object, if the Court please,—

Mr. McMillan: Q. (continuing) The entire property.

Mr. Cornish (continuing):—on the ground it is incompetent, irrelevant and immaterial, and not the test of damages.

The case of Board of County Commissioners of Roosevelt County versus Good, 105 Pacific Reporter 2d, page 470; 4 New Mexico, 495, citing a number of authorities, is to the effect that where the condemnation seeks not the property itself, but

(Testimony of Arthur F. Bishop.)

the mineral value in the property, that the test of the value of [225] the right taken is the value of the mineral, as distinguished from the value of the land itself. Had they sought to take the land, it has to be the value of the land, but since they sought to take the mineral in the property, the test is the value of the mineral which they sought to take.

I think your Honor is no doubt familiar with that decision. It is the Board of County of Commissioners of Roosevelt County versus Good, 105 Pacific 2d, 470, which, to the extent of our research, is the latest pronouncement on that question.

Mr. McMillan: May it please your Honor, the case to which Mr. Cornish refers is a case where specifically only the gravel and sand was taken. There was no other use taken in connection with the property. That was all, and it was actually taken. It then became necessary to fix the value of it necessarily separately.

Our contention is that the value of this property, in view of the fact that nothing was taken whatever, was the market value of the property at the time of the taking, with the gold in place, and I desire to pursue that for a few moments to make it clear, if I may.

The Court: You may.

Mr. McMillan: I am not reading, your Honor, from page 799, 20 Corpus Juris, Section 246 (reading):

“Where the land taken contains mineral, the

(Testimony of Arthur F. Bishop.)

measure of compensation is the market value of the land with the minerals in it, and the value of the minerals cannot be shown separately.”

It is to be remembered always in this case that we didn't take separately only the gravel and sand. We took other uses incidental to the construction of this project, and we took an [226] easement of two years over this entire property.

Now, many cases are cited in the footnote of that completed work and in 29 Corpus Juris Secundum, page 1043, Section 174. One of the cases cited I will read briefly from to your Honor, and call your Honor's attention to—United States versus Montana Railway Company versus Warren, reported in 137 U. S., 348; reported also in 11 Supreme Court Reporter, page 96—that volume I haven't here with me. But I am now reading from the case of Forest Preserve District of Cook County versus Caraher, reported in 132 Northeastern, page 211; also reported in 299 Illinois, at page 11 (reading):

“The rule is that compensation must be estimated for the land as land, with all its capabilities, and if there is timber on it, or coal, oil, or other minerals under the surface, they are to be considered so far as they affect the value of the land, but they cannot be valued separately. Trees were a component part of the land, and there was no justification for admitting evidence of what could be realized by separating the timber from the land as personal property.”

(Testimony of Arthur F. Bishop.)

The opinion then states (reading):

“Not only was it error to allow the value of the trees when converted into lumber to be estimated separately, but the inevitable effect of such testimony as was admitted would lead to all sorts of collateral issues as to expenses, transportation, and other matters taken account of by the witness, which would be confusing in the extreme.”

As here, the cost of machinery, if we put machinery in there [227] of a certain size, and the market conditions, and the seasonal conditions—that would all enter into the value of this gravel.

And a decision similar to that, holding exactly the same, is the case of Morton Lumber Company, I think it is—a very well known case—it is Morton Timber Company versus United States, 91 Federal 2d, 884. In that case it was sought to value the timber separately from the land itself, and the Court held, for reasons similar to those expressed in the decision I just read, that whilst their enhanced value may be taken into consideration, that it is timber, fir, and it has great value; you may take all that into consideration, as you may in the consideration of the highest and most profitable use to which a property may be put, just like a reservoir site, you may take all that into consideration, and if a property has sugar pine, and the very best forest on it, that is enhanced value to be taken into consideration, because the most profitable use it could be put to would be for, we will say, recreational site purposes, or for lumber purposes, but

(Testimony of Arthur F. Bishop.)

you cannot sit down and start in figuring that by putting in a lumber plant and cutting down those trees, and with the state of the market, and all that, the value of the trees would be so much. You would not consider them separately; you would consider them on the land, in arriving at its highest and most profitable use, its market value, taking into consideration its highest and most profitable use.

In *City of Los Angeles versus Deacon*, reported in 119 California Appellate Reports, page 491, reading from page 492, the Court said (reading):

“The admission of evidence as to the net profit made in operating a rock and gravel plant on the property being condemned in this action, was error which, [228] it is our opinion, requires a reversal of the judgment.”

Then the Court goes on to state and fix quite fully what may be asked on direct examination and what may be asked on cross examination.

But on the point in this case, as far as that is concerned, that should be considered with and as a factor in forming the opinion as to the highest market value of the property at the time of taking, taking into consideration the enhanced value, here is a leading case—it is a case in which the State Highway Commission condemned a piece of property in the State of California, and in that property there was a lot of sand, a great quantity of sand, I believe, and it was contended that that should have been valued separately, and value

(Testimony of Arthur F. Bishop.)

given to it aside from the market value of the land, and it was held in this decision (reading):

“In such action the defendants were not entitled to prove, as an element of damage, in addition to the general damage sustained by virtue of the taking of the condemned strip of land for highway purposes, plus any severance damages which might have been suffered, the market value of sand and gravel which were taken from borrow-pits on the borders of the condemned lands and used in constructing the causeway adjacent to the pits from which said sand and gravel were taken, where the value of such sand and gravel was included in the general damages assessed in the taking of the land.”

The Court: That is sufficient.

Mr. Cornish: May it please your Honor, I am familiar with that rule, and I know it is the rule where they take the land itself. [229]

Now, had the Government taken the land itself in this case, like the State Highway Commission in taking land to be used as a public highway, or condemning land for a park, that has trees on it, that is the rule. But this is an exception, as laid down in the New Mexico decision which I cited to your Honor, and there are a number of Supreme Court decisions cited, that where the Government seeks to condemn the mineral resources themselves, as distinguished from the land itself, they must pay the value of the mineral resources.

Now, the specific question in that case, as in this,

(Testimony of Arthur F. Bishop.)

was this: The defendants had rock which the plaintiff wanted to use as paving rock. The defendants sought to prove that that rock had a value mixed with cattle feed, and had for that purpose a much higher value than paving rock. The Government said in the first place they were condemning only paving rock; they weren't condemning cattle feed. And in the second place, at any event they could not be held for more than the value of the land. The Supreme Court of New Mexico held that it was error for the Court to preclude the defendants from showing this higher value that the defendants had, because instead of condemning the land itself, the plaintiff condemned the minerals in it.

Now, similarly in this case, the Government was condemning not the use of the property for two years; they were condemning the right to take gravel for a period of two years, and since they were condemning the right to take gravel, the value to be determined is the value of that right to take gravel as distinguished from the value of the land itself.

Now, it is the defendants' contention that they are not bound by the market value of the property, because we know that after this suit was filed, on August 28, 1940, the United States [230] of America sold this land, and confirmed that by a land patent, for \$2.50 an acre, which would make a total price of \$100 for the entire piece of property.

Now, if we are limited in our recovery to the market value of the property, it can well be argued

(Testimony of Arthur F. Bishop.)

that we paid only \$100 for this property, and we are not entitled to collect any more; but since it was the mineral they sought to take, as distinguished from the land itself—it would be comparable to a situation where the Government wanted to run a highway over property that was oil-bearing. If the Government only condemned a right-of-way over that property, or condemned the surface rights, as distinguished from the mineral and oil rights, you couldn't make them pay for the oil and minerals. On the other hand, if the Government wanted to take that oil itself, as distinguished from the surface, then the Government must take into consideration, in fixing the price, the value of the mineral it seeks to condemn.

The Court: The objection is sustained.

Mr. McMillan: Q. Do you remember my question, Mr. Bishop?

A. Yes.

Q. Now, I am emphasizing this: I want you to keep in sight this, the enhanced value now of that property by reason of the gravel carrying this gold, and I want you to keep in mind this factor, that you are familiar with these gold tests, the fact that you have heard Mr. Morrison's testimony; that you have heard Mr. Wiltsee's testimony; and that you are familiar with the tests that were made by the Government under your supervision. Keep that all in mind. Now, you know that those tests were, and you may base it, if you please, upon the yardage which was given by Mr. Wiltsee—that is to say,

(Testimony of Arthur F. Bishop.)

600,000 cubic yards, at least. What then, in your opinion, was the fair market value of that [231] property at that date? Now, I mean the whole property, everything, with all its enhanced value, and I mean in fee, not for two years.

Mr. Cornish: Same objection, if your Honor please. Your Honor just sustained that objection.

Mr. McMillan: No; your Honor sustained the right to ask that question.

Mr. Cornish: I understood your Honor said, "The objection is sustained." I might have misheard your Honor.

Mr. McMillan: You misheard his Honor.

Your Honor sustained my right to ask that question.

Mr. Cornish: I understood your Honor to say the objection is sustained. Possibly I misheard your Honor. May I refer to the reporter's notes?

(Record read by the reporter.)

The Court: I intended "Overruled."

Mr. Cornish: The objection is overruled?

The Court: Yes.

Mr. Cornish: May it be stipulated, Mr. McMillan, to save repetition of our objection, that any questions that you ask the witness as to the value of the property are objected to by us on the same ground, and I won't have to be jumping up all the time, and the Court has overruled the objection that that is not the proper test of value in this case?

Mr. McMillan: Correct.

(Testimony of Arthur F. Bishop.)

A. In my opinion, to me it would be worth between twelve and thirteen thousand dollars.

Q. I am talking about in the open market, on a cash sale, a person knows that property up there, and it is put up in the open market for sale, and a buyer comes along—it is not put up under forced circumstances, but under free circumstances, and a buyer comes [232] along and he has the cash. What would you say would be the market value of the property?

Mr. Cornish: I object, if the Court please, on the further ground that there is no foundation laid; that this witness has not been qualified as an expert on pricing property; that he has merely been qualified as a contractor, as a driller, and having done some mining, and it is not on the valuing of mining property or real estate in this vicinity, and as far as mining is concerned, in fact, by his own testimony he has not had any experience any closer to this property than in Calaveras County.

Mr. McMillan: Q. In answer to that, Mr. Bishop, will you proceed to state what properties you have purchased, what mining properties you have been interested in, and what properties your company and yourself have gone ahead and leased? On a royalty basis, that is.

A. Well, I will just go over those same operations that we have had in the past on the Feather River and the Gray's Flat.

Q. Well, did you ever buy any property, any mining property?

(Testimony of Arthur F. Bishop.)

A. Yes, we bought that particular property I mentioned.

Q. Yes. Have you ever purchased property, or leased property on a royalty contract?

A. Yes. That is——

Q. Mining property?

A. That is how we have done most of our—we get most of our land through royalties.

Q. Many of them?

A. Well, I would say about 10 or 12, something like that.

The Court: Q. Have you had any experience in the valuation of land?

A. I have not appraised lands in general, no.

Mr. McMillan: Q. But you are familiar with the values of mining property?

A. Yes, sir, I am.

Q. You have had experience in that regard?

A. Yes. [233]

Q. And this is a mining claim, is it not?

A. As I understand it, yes.

Q. You have seen it and know the property?

A. Yes.

Mr. McMillan: I submit that the witness is sufficiently qualified as to this property.

The Court: The objection is overruled.

Mr. McMillan: Q. What would you say would be the cash market value—that person who buys the property to have the same knowledge that you have with reference to its enhanced value?

(Testimony of Arthur F. Bishop.)

A. I would say between twelve and thirteen thousand dollars.

Q. Not to exceed that? A. No, sir.

Q. That is for the entire property?

A. Yes.

Q. Now, what would you say would be the fair rental for its use and occupancy for one year and eleven months?

Mr. Cornish: Same objection, if the Court please, on the ground that this witness has not qualified as having the knowledge of value of use and occupancy of property; and furthermore, that it doesn't appear for what purpose.

Mr. McMillan: Any purpose.

Mr. Cornish: You mean as a farm, as a mine, or what?

Mr. McMillan: Q. No; mining claim. Just to be in use and occupation of the property, without taking anything from it. Put in possession of it.

Mr. Cornish: To which we object, if the Court please, on the ground it is incompetent, irrelevant and immaterial. This action involves the condemnation of a right to take gravel, and not the right to use property for two years and take nothing from it.

Mr. McMillan: Well, obviously, may it please your Honor, if you have a right to take gravel to use in the construction of [234] something, you must go on the property; you must build roads; you must have the use of the property. And that is ob-

(Testimony of Arthur F. Bishop.)

viously the reason for taking a two-year easement. You are going to use the property to take gravel.

The Court: The objection is overruled.

Mr. Cornish: May I state, your Honor, we don't contend that this property has any rental value apart from the minerals in it? In other words, the question Mr. McMillan has asked is, What is the value of the use and occupation of this property for a period of one year and eleven months? I am willing to stipulate it is not worth more than a dollar a month, except for the fact that someone might want to take minerals from it. The Government did not condemn the use and occupancy of this land; they condemned the right to take gravel from it, and even to take the gold from it if they saw fit. And I don't see how the value of the use and occupation of this property alone, without considering any other rights that the Government had the privilege to enjoy, although they didn't enjoy them, had anything to do with the question before the Court here.

Now, if your Honor considers that is material, I will concede that a dollar a month would be a fair and reasonable rental for this property.

Mr. McMillan: No; I propose to fix the value, and if counsel believes that there is no way to fix that value, it is out contention, then, that that value should be fixed by a reasonable rate of interest on the value of the property.

Mr. Cornish: I am perfectly willing to stipulate, Mr. McMillan, that the reasonable rental value

(Testimony of Arthur F. Bishop.)

of that property for the use and occupation, without taking anything from it, is a dollar or less—in fact, I will stipulate it has no value without [235] the right to take minerals.

Mr. McMillan: I don't care to take the stipulation. We will make our proof, may it please your Honor.

The Court: Proceed.

Mr. McMillan: Q. What would you say that the use and occupation of that property for one year and eleven months, the property which you say would have a market value of from twelve to fifteen thousand dollars—just to be in possession of it, and not to take anything from it?

A. Well, I would say that the figure should be about the same.

Q. In other words, you say that to be in possession of that property for one year and eleven months, that a person should pay \$15,000 for that?

A. Well, that was my opinion.

Q. For the rental value for two years, and not to take anything from it; not to mine it or do anything with it?

A. Yes; under the conditions, yes.

Mr. McMillan: Well, there is a great misunderstanding on my part.

The Court: There must be a misunderstanding.

Mr. McMillan: Q. I am talking about what should be the rental. You say that the property was worth twelve to fifteen thousand dollars?

A. Yes.

Q. The cash value of the property?

(Testimony of Arthur F. Bishop.)

A. Yes.

Q. On that date? A. Yes.

Q. Now I am asking you, the property being of that value, the fee, to be in the possession of the property for one year and eleven months, and not to mine it or do anything with the property—just to be in possession,—what would be the value of that? A. Oh, I beg your pardon——

Q. I think you misunderstood me, Mr. Bishop, and grossly so, isn't [236] that true?

A. Yes, I misunderstood you. I would say it would be worth no rental.

Q. You would have to fix it, then, on some theory, as I have indicated; upon an interest basis, reasonable interest basis on the value of the property, is that true?

A. That is what I tried to work out as the value of the property, the interest on what that property should return.

Q. That is, the interest on the value of that property for one year and eleven months, a reasonable rate of interest? A. Yes, sir.

Q. On the value of the property?

A. Yes, sir.

Q. Which was not higher than \$15,000, as I understood you? A. Yes.

Mr. McMillan: You may take the witness.

The Court: Well, it is so close to adjournment time. Did you wish to take up the two minutes that are left?

Mr. Cornish: No, I think we will take longer

than the two or three minutes that are left, your Honor.

The Court: The Court will adjourn until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Friday, November 19, 1943, at 10:00 o'clock a. m.) [237]

Friday, November 19, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

ARTHUR F. BISHOP,

recalled for the Government; previously sworn.

Mr. McMillan: May it please your Honor, may I ask the witness one or two more questions? There is something I should have introduced in evidence yesterday,—

Mr. Cornish: I have no objection, your Honor.

Mr. McMillan (continuing): —for the information of the Court and everyone.

Direct Examination

(Resumed)

Mr. McMillan: Q. I observe on this Government's Exhibit No. 3, a survey showing the tests

(Testimony of Arthur F. Bishop.)

for gold made on the property here under consideration, the 40.34 acres of land, that there is no log shown; the depths are not shown, and whilst there is here test hole depths, it is incomplete for the information of the Court, and I want to get those logs introduced in evidence.

Mr. Bishop, those tests were made under your direction and supervision, were they not?

A. Yes.

Q. However, Mr. Dorian panned the gold, did he, and kept the record? A. Yes, sir.

Q. But under your direction and supervision?

A. Yes, sir.

Mr. McMillan: Have you any objection to the introduction of these tests?

Mr. Cornish: No, I haven't, Mr. McMillan. [238]

Mr. McMillan: Q. How many documents are there there?

A. The field log sheets on nine holes and the gold samples.

Mr. McMillan: Well, I will introduce this document. This is a field log. As the Government's exhibit next in order. That would be——?

The Clerk: 4.

Mr. Cornish: May I see it first, Mr. McMillan?

Mr. McMillan: And I am going to have him, Mr. Cornish, read it to his Honor. I think I can get copies to give you later on.

This will be Government's Exhibit 4.

The Court: Admitted.

(Testimony of Arthur F. Bishop.)

(The field log referred to was received in evidence and marked U. S. Exhibit No. 4.)

Mr. Cornish: Do you want him to read it, or are you going to read it?

Mr. McMillan: I am going to have him read them.

Q. Will you read these (handing exhibit to the witness)?

A. Do you want them in their entirety?

Q. Yes; I want them all read in.

A. This is Field Log on Hole No. 1:—

Mr. Cornish: May I interrupt you just a moment?

I take it, Mr. McMillan, that he is going to read these in sequence, from 1 to 9? He refers to Hole 1, Hole 2, and so forth; that is, the holes that are marked by numbers on the map, United States Exhibit 3?

Mr. McMillan: Correct.

The Witness: Do you want the depth of the hole, and value, or do you want all this other information?

Mr. McMillan: I want the depth of the hole, the value as you go down; read the prices, the depths, and the color, and the [239] gold at the depths; and finally the yardage, and how much it ran per cubic yard. Start in with Test Hole 1.

A. Test Hole No. 1—

Q. Read it to his Honor, Mr. Bishop.

A. Depth—it is headed “Depth of pipe”—is

(Testimony of Arthur F. Bishop.)

three feet in this first case, and the pumping three feet, and the core was two feet three inches, the measured core was 450 cubic feet. River sand, small gravel.

The second depth was four feet, the pumping four feet one inch, the core was one foot one inch, the cubic feet was 300, the total estimated milligrams—there was a trace of gold in this; river sand and small gravel.

The third was five foot depth, pumping five foot, the core was one foot four inches, cubic feet 175, and a trace of gold. Sand, small, medium and fine gravel.

The third was six feet in depth, pumping six feet one, core was six inches, the measured core was 150 cubic feet, and there were two No. 3 colors; medium and fine gravel and sand.

The next was seven foot seven inches, pumping seven foot seven inches, core was eight inches, 225 cubic feet, with a trace of gold; loose gravel and sand.

The next was eight foot six inches, pumping eight foot eight, core was ten, cubic feet 200, a trace of gold, loose gravel and sand.

Nine foot six was the next, with the pumping nine foot eight, the core nine inches, 200 cubic feet, no gold showing; loose gravel and sand.

The next was ten foot six, with pumping of ten foot seven, the core three inches, 100 cubic feet; there were 20 No. 3 colors and one trace, which is

(Testimony of Arthur F. Bishop.)

a very, very small indication of gold; [240] coarse gravel and sand was the formation.

Eleven foot six was the depth of the pipe, pumping eleven foot six, the core was nine inches, the measured core was 150, with six No. 3 colors and one trace; medium and coarse gravel.

The next depth is twelve foot one inch, the pumping twelve foot two, the core was nine inches, 175 cubic feet, 10 No. 3 colors, one trace; gravel and bedrock.

Bedrock was thirteen feet, and they pumped to thirteen feet, with a core of one foot four inches, with a trace of gold.

They drilled into the bedrock 14 feet, pumped 14 foot one inch, the core 11 inches, and the measured core of 225. Bedrock is the formation.

Mr. Cornish: Q. Does that report give the total depth of the hole?

A. The total depth of hole, yes.

Q. Will you read that again?

A. The total depth of hole,—they hit bedrock at 12 feet—12 foot one inch, and drilled into bedrock to 14 feet. This is Hole No. 2——

Q. And does that also give the value on that log?

A. Yes, it will give the value. The value as determined was six cents per cubic yard. There were 7.5 milligrams of gold recovered in the hole. Now, on this log sheet it notes here 12½ feet of calculated depth, but you will note they drilled into the bedrock.

Q. In other words, 12 feet and one inch to bed-

(Testimony of Arthur F. Bishop.)

rock, and then one foot and 11 inches into the bedrock?

A. Well, there is a difference in there that—it isn't exactly clear, but it says gravel and bedrock, you see, at that 12-1, and then 12½ feet is where they calculated the quantities.

Mr. McMillan: Q. I notice on that sheet there is a gentleman whose name is J. L. Nicholson, that worked with the panner, R. E. Dorian. He, too, worked under your supervision? [241]

A. Yes, sir.

Mr. McMillan: I fear, your Honor, this may be a long drawn out agony, to have him read to your Honor all those. Let's see if I can devise a better method.

Q. Have you there a computation?

A. I have a tabulation here showing the number of holes, the calculated depths, the milligrams of gold recovered, and the value per yard as determined.

Mr. McMillan: Yes.

Now, may I introduce this in evidence as Government's exhibit next in order?

Mr. Cornish: Are you going to read that, Mr. McMillan?

Mr. McMillan: I will read it, yes.

Mr. Cornish: Because if not I will copy it off.

Mr. McMillan: I would like to have His Honor have the information. I understand there is no objection.

The Court: Admitted.

(Testimony of Arthur F. Bishop.)

(The tabulation referred to was received in evidence and marked U. S. Exhibit No. 5.)

Mr. Cornish: This is a synopsis of the drill logs which the witness started to read?

Mr. McMillan: Yes. It only gives the depth, the weight of gold, and the value per cubic yard.

Bar No. 1, depth $12\frac{1}{2}$ feet, weight of gold 7.5 milligrams.

Q. Is that right? A. Yes, sir.

Mr. McMillan: Value per cubic yard six cents.

Bar No. 2, 13 feet, 100.6 milligrams, 77 cents.

Bar No. 3, or Test Hole No. 3, $15\frac{1}{2}$ feet,—

Mr. Cornish: Fifteen and a half?

Mr. McMillan: Yes; $15\frac{1}{2}$. [242]

Weight of gold, 58.7 milligrams; value per cubic yard, 37.4 cents.

Bar No. 4, $24\frac{1}{2}$ feet depth; 55.2 milligrams, weight of gold; value per cubic yard, 22.5 cents.

Mr. Cornish: What was the depth of that again, Mr. McMillan?

Mr. McMillan: Twenty-four and one-half feet.

Test Hole No. 5: Depth, 20 feet; weight of gold, 78.2 milligrams; value per cubic yard, 39 cents.

Test Hole No. 6: Depth, 19 feet; weight of gold, 61.6 milligrams; value per cubic yard, 32.2 cents.

Test Hole No. 7: Depth, 16 feet; weight of gold, 45.7 milligrams; value per cubic yard, 28.2 cents.

Bar No. 8: Depth, 21 feet; 118.2 milligrams, weight of gold; value per cubic yard, 56.2 cents.

Test Hole No. 9: Depth, 20 feet; weight of gold, 28 milligrams; value per cubic yard, 14 cents.

(Testimony of Arthur F. Bishop.)

Q. Do you happen to have the gold there?

A. Yes, sir.

Q. How many bottles?

A. There are nine samples.

Q. And are they endorsed as to each hole?

A. Yes, sir.

Mr. McMillan: Well, I will introduce the entire box in evidence as one exhibit, and that will be, may it please your Honor, Exhibit No. 6.

The Court: Admitted.

Mr. Cornish: May I see those?

(The gold samples were handed to Mr. Cornish.)

Mr. McMillan: They are all there, aren't they, Mr. Cornish?

Mr. Cornish: There is nine there. I take it there are nine.

The Court: Admitted.

(The box containing the nine gold samples referred to was received in evidence and marked U. S. Exhibit No. 6.) [243]

Mr. McMillan: That is all, may it please your Honor.

You may cross examine.

Cross Examination

Mr. Cornish: Q. Mr. Bishop, do you have those logs there in your hand?

A. Yes, I have a copy of them.

Q. Would you refer to your log of Hole No. 2

(Testimony of Arthur F. Bishop.)

and tell me how far into the bedrock you drilled?

A. It appears here that the bedrock was encountered at about 13 feet, and it shows here they drilled into the bedrock up to 16 feet.

Q. And what was the total depth after you drilled in the bedrock in Hole No. 3?

A. Sixteen feet two inches.

Q. In other words, that hole was drilled about eight inches into the bedrock? A. Yes, sir.

Q. And how about Hole No. 4?

A. Well, it seems that they just went into the bedrock a few inches—about three inches.

Q. That would be a total depth of 24 feet 9 inches?

A. It is 24 feet 5 inches, the calculated depth.

Q. That is the total depth of the hole?

A. 24 feet 5 inches.

Q. Am I correct, Mr. Bishop, that the depth of the gravel to bedrock, and the depth of the hole, was the same on that hole?

A. It was practically the same, yes.

Q. And what was the character of that bedrock, hard or soft?

A. It was a terrifically hard bedrock.

Q. Hard bedrock? A. Yes.

Q. Hole No. 5, what was the total depth of that hole?

A. The calculated depth, the depth they calculated the quantities on, was 20 feet, but they went into bedrock to a depth of 21 feet. That was the total depth of the hole.

(Testimony of Arthur F. Bishop.)

Q. On Hole No. 6?

A. Calculated depth was 19 feet, and they [244] bottomed at 19 feet 6 inches.

Q. And Hole No. 7, the same information.

A. The calculated depth was 16 feet, and they went to the depth of 18 feet.

Q. Nineteen? A. Eighteen.

Q. That would be about two feet into bedrock?

A. Yes, sir.

Q. And Hole No. 8, the same information.

A. Calculated depth was 21 feet, and they bottomed the hole at 21 feet 9 inches.

Q. And Hole No. 9?

A. Calculated depth was 20 feet, and the hole was bottomed at 20 feet 9 inches.

Q. May I take a look at those drill logs you had? Do you have the original?

Mr. McMillan: The Clerk has them.

Mr. Cornish: Oh, I beg your pardon.

Q. Now, in some of these holes—for instance Hole No. 2, you found bedrock at 14 feet 6 inches, is that correct?

A. Well, not according to this copy here. The bedrock was—well, they struck the bedrock apparently about 13 feet—

Q. I beg your pardon; that is Hole No. 3. You found bedrock at 15 feet 6 inches?

A. Yes, sir.

Q. And you found a trace of gold at a distance of six inches under bedrock, or six inches into bedrock, is that correct?

(Testimony of Arthur F. Bishop.)

A. Yes; there was a trace, yes.

Q. And that was a soft bedrock?

A. Well, it wasn't soft. It is considered fairly hard bedrock.

Q. I notice the notation on this log, "Black clay mixed with bedrock at 14 feet 6 inches."

A. Well, probably a slaty material under this.

Q. And on Hole No. 4 you drilled to a depth of 24 feet—or 24 feet 6 inches? A. Yes, sir.

Q. Which was it, 24 feet, or 24 feet 6 inches?

A. It shows 24—[245] on this log it shows 24 feet 3 inches.

Q. 24 feet 3 inches? A. Yes, sir.

Q. Now, on this log that has been offered in evidence, Mr. Bishop, it says——

Mr. McMillan: Admitted in evidence.

Mr. Cornish: Admitted, yes.

Q. Oh, I see—from twenty-four two to twenty-four three you hit bedrock. Now, you also found a trace of gold in the bedrock there?

A. Yes, sir.

Q. You didn't drill beyond that to determine whether the gold continued in the bedrock. Now, I notice in your log for Hole No. 4 the notation, "Water level, three feet four inches." I take it that that was three feet four inches above the bedrock? A. I don't see that on this copy.

(Mr. Cornish exhibited the document to the witness.)

The Witness: No, that would be three feet four inches from the surface.

(Testimony of Arthur F. Bishop.)

Mr. Cornish: Q. Three feet four inches from the surface?

A. Yes, sir.

Q. Then this Hole No. 4, which is this one down here (indicating), you found went roughly 21 feet below the water level?

A. Yes, roughly; that is right.

Q. And I take it at the time you started drilling this you were at a point approximately three feet above the level of the water in the river?

A. Yes, sir.

Q. Now, on the log for Holes No. 1, 2, and 3, there is no notation as to water level. Are we to infer from that that as you drilled Holes No. 1, 2, and 3, that you didn't get below the water level?

A. Not necessarily, no.

Q. Or is that something that has just been let off that drill log? [246]

A. Evidently it is an omission there. Particularly—three was pretty close to the river, and bound to have been in that water strata.

Q. And on Hole No. 5 you have a notation, "Water level two feet," and "Depth of gravel 19 feet 6 inches." A. Yes.

Q. Hole No. 5 is this hole up here (indicating)?

A. Yes, sir.

Q. And that was the one you drilled just to the bedrock, wasn't it, or did you drill into the bedrock?

A. No; we drilled into the bedrock a foot there.

Q. And one foot from the level of 20 feet to

(Testimony of Arthur F. Bishop.)

21 feet 6 inches they took out eight milligrams of free gold? A. No; 78.

Q. No; from a distance of—from the level of 20 feet to the level of 21 feet 6 inches, or a distance of a foot and a half into the bedrock, you took out eight milligrams of free gold?

A. Of course, that was an estimate of the weight—that is just an estimate.

Q. I mean there was some free gold in the bedrock? A. Yes; apparently that is the case.

Q. And you found on several holes that you sunk that when you got into bedrock the value was continued into the bedrock, didn't you?

A. Well, they could have been carried into the bedrock by the drilling operation. That doesn't mean that the bedrock contained or carried that gold itself; it could be carried in the gravel.

Q. Would you explain, Mr. Bishop, how this value would be carried into the bedrock by the drilling operations?

A. Well, these drills, or the drill pipe is driven into the formation, and then the drills break the rock up, and to the bottom of the pipe shoe that material is pumped out, and then the procedure is repeated until it is carried down to bedrock. Now, [247] it is just possible, when you have got down to that elevation, the gold has sifted on through, and the pump didn't pick it all up in that particular operation.

Q. Then in this Test Hole No. 5 to which we are now referring you drove a pipe down into the

(Testimony of Arthur F. Bishop.)

gravel, and for a distance of 17 feet 6 inches you were driving that pipe you were working below the water level? A. Yes, that is true.

Q. Now, the customary method of recovering gold, freeing it from the substance with which it is found allied, gravel and sand and rock, is by agitation and gravity, is it not? A. Yes.

Q. In other words, the principle is that when you have a number of substances, some of which are of high specific gravity and some low, and you agitate the mass, that those with the heavy specific gravity drop to the bottom and those with the lighter specific gravity are thrown up to the top?

A. Yes.

Q. And you found that this gravel in this Hole No. 5 was for the most part loose and free-running, didn't you? A. Yes, it is.

Q. And when you drive these pipes down in there you hammer on the top of them to force them in, don't you? A. Yes.

Q. And that has a tendency, does it not, to agitate and vibrate the mass in which the pipe is being driven? A. It could.

Q. And that could also have the tendency to create the same action you get in a gold pan when you vibrate it, namely, gold being heavier would have a tendency to fall, and the gravel and the sand being lighter would have a tendency to rise?

A. Yes.

Q. Then as you drive your pipe, then, it is possible, is it not, that you drive the gold ahead of

(Testimony of Arthur F. Bishop.)

the pipe; perhaps you eventually pick it up at the bedrock, but your drill tests don't show accurately the value of gold in the top layer? All you know is [248] when you get down to the bottom you have driven a certain column and pumped out the contents?

A. That is not necessarily true, because with the suction arrangement that material is brought up with it picks up the gold and the solid—we will say to the bottom of the shoe, where it is more or less solid, and it has been the experience that these colors are picked up as they go along and determine—well, they are fairly accurate recovery all the way down——

Q. In other words, ——

A. You will note on a number of these logs that they picked up colors all the way along, and not necessarily are the heaviest on the bottom.

Q. You found in a number of cases there were values in the upper strata? A. Oh, yes.

Q. And the gold was not entirely confined to the lower strata? A. That is true.

Q. But you wouldn't say that if you drove a pipe down a foot you would get all the gold that is in that foot, or whether you would go down another foot and pick some of it in the next foot?

A. I think it has been determined over a number of years by drillers that the recoveries are pretty close, and for all practical purposes they are accepted, and the values determined for the particular

(Testimony of Arthur F. Bishop.)

elevation that they are drawn from with this suction arrangement.

Q. Now, I notice a number of figures which you have here under the heading of "Measured Core," such as, looking at Log No. 5, the figures "200, 150, 200, 200," and so on down. What do those figures represent, Mr. Bishop?

A. They represent the—well, now, this core, for instance, that is drawn out of the pipe. Now, take on No. 3, for instance. That represents the number of [249] feet and inches of this formation, or this taken-up gravel came into the pipe and was pumped out, which is—in that particular instance, is almost a perfect core.

Q. For instance, you are referring now to No. 3, are you?

A. Yes, sir, referring to that first core in No. 3.

Q. The first core in No. 3? A. Yes.

Q. The figure "320"?

A. Yes. Well, that is measured—they measure the cubical contents to check the—that is, after it is taken out and it is measured in some kind of a container, to check up the volume as against the volume in their measured core.

Q. Now then, this measured core, 320, how many cubic feet would that designate you had measured in that core?

A. In this particular instance, that isn't too clear to me. I think—well, it very definitely is not too clear to me on these particular checks of the

(Testimony of Arthur F. Bishop.)

measured core as against the core that was drawn from the pipe.

Q. In other words, you wouldn't say that that amount, that 320 cubic feet of gravel, were measured in that sample? A. Oh, no.

Q. There might be some——

A. Definitely not.

Q. I beg your pardon? A. Definitely not.

Q. Then can you tell from those logs the total cubic yardage or cubic footage of the gravel removed in the hole in making the test?

A. Oh, yes, that can be determined.

Q. All right. Does it show on the log?

A. Yes, it shows in that formula. You will notice——

Q. Well, for instance, looking at this log, Log No. 3, the one to which you refer, this formula "58 times 1 times 27 over 15.5 [250] times 27"——

A. Yes, sir.

Q. (continuing): ——"equals 37.4"?

A. Yes, sir.

Q. How do you determine from that the number of cubic feet?

A. Well, in getting an ideal section from a drill pipe, you have to calculate the area of the pipe, which in this case was the drill, the shoe, the driving shoe was seven inches in diameter, and it is through that, that seven-inch diameter in that area is driven up into the pipe as the pipe was driven down into the formation, and that area is calculated per foot in depth—that area is calcu-

(Testimony of Arthur F. Bishop.)

lated, and the values are considered at the number of milligrams, and then brought to a cubic yard basis.

Q. What I am trying to find out, if I may, Mr. Bishop, if you can tell me, is just what volume of earth or gravel was removed in making this Hole No. 3. Was it a cubic foot, three cubic feet, or a cubic yard, or how much—or can you tell from the logs?

A. No. No, there was—well, let's see——

Mr. McMillan: That is a copy you have there, Mr. Bishop; it is not the original?

The Witness: No, this is not the original.

Mr. Cornish: If there is anything on this original that you want, Mr. Bishop,—

The Witness: No, that is all right. I have the information.

Mr. McMillan: Well, I just had in mind he was writing on that sheet. He can write all he likes on that one.

A. (continuing) Roughly, there was 4.23 cubic feet of material.

Mr. Cornish: Q. 4.23?

A. Yes, sir.

Q. Now, your holes averaged roughly about 18 or 19 feet in depth, didn't they?

A. Yes; I think roughly between 17 and 18.

Q. And that would be between four and five cubic feet was removed on the average from each hole?

(Testimony of Arthur F. Bishop.)

A. Well, I imagine that is about what it averages.

Q. And out of the nine holes there would have been roughly 45—40 to 45 cubic feet of gravel, or somewhere between 1 2/3 to 2 cubic yards of gravel in the entire bar that was actually tested?

A. Yes, that is about it.

Q. Now, on some of these logs, Mr. Bishop, I notice you have the character of the bedrock marked and on some of them you don't. For instance, on Log No. 1 you have "Bedrock, 12 foot slate."

A. Yes.

Q. That was a slate bedrock that you found—or 12 foot slate—that was a slate bedrock that you found at the bottom of Hole No. 1?

A. Yes. As I—

Q. And that was this hole that was made up near the cabin (indicating on map)?

A. Yes.

Q. Did you, when you were up there, observe a pit or a hole behind the cabin?

A. No, sir.

Q. And if I were to tell you, Mr. Bishop, and you were to assume that the ground immediately behind the cabin—that would be approximately at the "C" in the word "Cabin"—were 21 feet in depth from surface to bedrock, and you drilled at the point which is marked on that map as "Hole No. 1," and found slate bedrock at a depth of 12 feet, would that indicate to you, Mr. Bishop, from your experience as a miner, any geological phenomena that you might want to further investigate?

(Testimony of Arthur F. Bishop.)

A. Well, it might include a channel to the south. That might be just a reef up there.

Q. It would indicate to you, would it not, Mr. Bishop, that the point where you had sunk that hole was on top of a reef, and that the values on top of that reef would be less than those that you [252] would expect to find distributed throughout the bar? A. That could possibly be.

Q. I notice, Mr. Bishop, that that one hole which you sunk to a depth of 12 feet 6 inches, showed a valuation or a value of six cents per cubic yard, and was the lowest of all the holes that you sunk.

A. That is right.

Q. And you took that hole, Mr. Bishop, to be characteristic or indicative of the values you found throughout that bar?

A. I should say it should be used in the averaging.

Q. It should be used as an average, but not at indicative of the values throughout?

A. No, I don't think so.

Q. Now, this Hole No. 2 you sunk to a depth of 12—to 13 feet, is that correct?

A. Yes, 13 feet is the calculated depth.

Q. You hit bedrock? A. Yes.

Q. And Hole No. 3, to a depth of 16 feet 6 inches? A. Yes, sir.

Q. Then you found, as you get out to Hole No. 4, that went considerably deeper?

A. Yes, sir.

Q. Now, did you notice any conditions of stream,

(Testimony of Arthur F. Bishop.)

any pool or any deeper portion of the stream at or near Hole No. 4?

A. No, I didn't; I didn't.

Q. Do you recall that out in the river between Holes No. 3 and 4 on the far side there was a big rock projecting up out of the middle of the river?

A. No, I didn't notice that.

Q. You didn't notice that?

A. I didn't notice that.

Q. If I were to tell you, Mr. Bishop, and you were to assume, that in the river immediately—just about opposite the middle of a line drawn from Hole No. 4 to Hole No. 5 there were a rock, and that was the east portion of the middle fork of the American River, would that indicate to you as a miner that you might expect [253] to find more or less values in the vicinity of Holes No. 4 and 5 than you would expect to find in the balance of the bar? A. Not necessarily.

Q. You know it to be a fact, do you not, that the deposits of gold in a placer of this sort are sometimes greatly increased by the presence of reefs, or what they call pot holes, distributed throughout the bedrock?

A. There is occasionally deposits where they are not scoured out that could decrease or increase——

Q. And it is customary to find in these placers, when you get to a hole, that if there is a reef crossed in the placer, that there is more gold on

(Testimony of Arthur F. Bishop.)

the downstream side of the reef than on the upstream side, is that correct?

A. I have seen that condition exist, and also I have found where we didn't have that condition.

Q. And you also find, do you not, that the evenner the bedrock the less deposit you find, and the more uneven the bedrock the more you are inclined to find deposited on the bedrock?

A. That is true, yes.

Q. Now, did you make any examination on this property to determine the presence or absence of reefs, or indications of reefs, or pot holes in the bedrock beneath that gravel? A. No; no.

Q. And in selecting your sites for these test holes what formed the basis of your determination that you would drill in the particular site that you did?

A. Well, it was just a general—just a general setup there to try to arrive at the location so we could get right at some reasonable estimate of volume and values.

Q. I notice you made no borings in that island that you found there (indicating on map).

A. No, we didn't bore on that island.

Q. You didn't bore on that island?

A. No.

Q. And you made no borings of the gravel in the bed of the stream? [254]

A. No; just to the edge of the stream, as shown on the map.

Q. But you found, though, for the most part,

(Testimony of Arthur F. Bishop.)

that the bed of the stream was a gravel deposit; the water was flowing over gravel?

A. Yes, the water was flowing over gravel, the flow of water.

Q. But you made no test to determine what value that gravel might have?

A. No, not in the middle of the stream.

Q. And your test holes, with the exception of Test Hole No. 9, were all made either from the hill side or the stream side of the bar?

A. Well, seven—let's see; Hole No. 7 was about halfway between, if you will notice (indicating on map).

Q. Hole No. 7, I notice right down here (indicating on map). That is about halfway between this little high water——

A. Channel.

Q. (Continuing): ——channel, and the hill.

A. That is right.

Q. The main channel of the river runs to the north,—doesn't run across what is shown there as an island, which makes that island—that is correct, is it not?

A. Yes.

Q. And Hole No. 7 you found went a depth of 16 feet?

A. Yes, sir.

Q. Then Hole No. 8 you found to be considerably deeper by about five feet than Hole No. 7?

A. Yes, sir.

Q. And you found Hole No. 9 to be a depth of 20 feet?

A. Yes, that is right.

Q. Then from your examination of the gravels, the depth at Hole No. 8 being 21 feet, and the depth

(Testimony of Arthur F. Bishop.)

of Hole No. 9 being 20 feet, and assuming that this hole in the back of the cabin were 21 feet, would you not say, Mr. Bishop, that this hole that you sunk, Hole No. 1, was sunk on the top of a reef?

A. It is possible; it is possible.

Q. And the stream action going over the top of the reef would have [255] a tendency to deposit very little, if any, gold right on the top of the reef?

A. Well, you ordinarily don't find it there.

Q. It would be either behind the reef or in front of the reef, but not on the top?

A. That is ordinarily true, yes.

Q. Now, did you notice a large pile of rock out in the middle of that bar near the location of your Hole No. 9?

A. Well, I noticed a large pile of rock which is evidently the result of some mining, and having been thrown out and wasted.

Q. What was the position of your Test Hole No. 9 with reference to that pile of rock?

A. I can't tell you that.

Q. You couldn't say whether it was within a few feet of it, or a hundred feet away?

A. No, sir.

Q. Now, Mr. Bishop, you testified yesterday that you considered the value, the market value of this property, bearing in mind the gold that you found from the tests present, that the market value of this property was, you say, twelve thousand to thirteen thousand dollars?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. And I take it that you, as a miner, if you wanted property to dredge or to work as a mine, would be willing to pay that amount for it?

A. Yes, that was my idea of it.

Q. And in your opinion, Mr. Bishop, that property is of no value for anything but mining, is it?

A. That is my opinion.

Q. As a cabin site, as a farm, as a ranch, as a place for pasturing cattle, it would have practically no value? A. No, sir.

Q. Now, what, in your opinion, Mr. Bishop, would be the reasonable value, the fair market value of the privilege of going onto this property without any interference from anyone, for a period of one year and eleven months, and remove gravel or any other minerals that might be found on the property during that period?

A. Would you repeat that question for me, please? [256]

Mr. Cornish: Read the question, please.

The Court: The reporter will read the question.

(Question read by the reporter.)

A. Well, if I would be going on the property I would be going on there with the idea of mining, and on account of the high speculative hazard there I wouldn't give any more than that.

Mr. Cornish: Q. I beg your pardon?

A. I wouldn't give any more than that amount of money.

Q. In your judgment the property could be

(Testimony of Arthur F. Bishop.)

completely mined in a year and eleven months, couldn't it? A. Yes.

Q. And from what you found from your test, be mined at a profit?

A. I believe so. That is my opinion.

Q. And from your knowledge of the middle fork of the American River, the gravels on this property are considerably higher in gold content than the gravels on the stream below—or don't you know that?

A. You mean the position of this property as regards the American River, or——

Q. The gravels on this particular bar have a higher gold content than the gravels on the middle fork of the American River to the south and southwest of this property?

A. Well, I don't know about that. I couldn't answer that.

Q. You don't know about that?

A. No, I couldn't answer that question.

Q. But you would feel that from twelve to thirteen thousand dollars would be a fair price to pay for the privilege of taking gravel, or any other minerals, off this property for a period of one year and eleven months?

A. That is my opinion.

Q. And in your opinion the mining of this property, the taking of the minerals from this property, is the highest and best value or use to which the property could be put? A. Yes, sir. [257]

(Testimony of Arthur F. Bishop.)

Q. Now, are you at all familiar with the recovery of gravel for use in concrete aggregates?

A. We have recovered some, but not to any great extent.

Q. It is more expensive, is it not, to operate a stationary plant on a mining project of this sort, than to operate a moving or floating plant?

A. Yes, sir.

Q. You wouldn't undertake to operate this in any way except with a floating plant, would you?

A. No, sir.

Q. Now then, Mr. Bishop, would you be able to express an opinion as to the value to the owner of that property, of having a hundred thousand yards of that gravel excavated from the bar, elevated to a height sufficient to run it through appropriate gold recovery devices, furnishing the water and the power necessary to operate those gold recovery devices, and carrying away the tailings? Could you put a value on that?

A. No, sir.

Q. What in your judgment, exclusive of the actual physical recovery of the gold, what in your judgment would it cost per cubic yard of dirt moved to mine that with a stationary plant? In other words, to do the excavating, to do the lifting, to furnish the water, to furnish the power, and to carry away the tailings, exclusive of the actual cost of the gold recovery devices themselves?

A. I wouldn't venture an opinion on that, not

(Testimony of Arthur F. Bishop.)

knowing the cost of the different items that enter into it.

Q. As a matter of fact, you wouldn't mine it in that way, would you? A. No, sir.

The Court: The Court will take a ten-minute recess.

(Recess.)

Mr. Cornish: Q. Mr. Bishop, in your test you made I take it you found no coarse gold or other than those samples that you [258] submitted?

A. That is the only gold we recovered.

Q. I will show you Defendants' Exhibit No. C and call your attention to a large particle of gold in there and ask you whether you found any gold of the character of that piece?

A. As I recall, we didn't recover anything of that size or character.

Q. And I also call your attention to Defendants' Exhibit H and ask you if you found any gold in your test of the character and size of that piece which I have just shown you? A. No, sir.

Q. Now, from your experience as a miner, Mr. Bishop, would you expect to find particles of gold of the size and character of these two I have just shown you in a formation of river gravel more or less to the one you observed on this property?

A. Yes; we have recovered quite a few nuggets.

Q. Now, will you describe, Mr. Bishop, the process which you used in cleaning out these various samples as you went down? You say you drove the

(Testimony of Arthur F. Bishop.)

pipe down first; then what was your process of lifting the material up?

A. The process that was used is what they call—well, it is a suction arrangement. This drill arrangement has a mechanical means of raising this bailer, they call it, which has a sort of valve arrangement in the bottom, raising it quickly, and it sucks the material up into the pipe.

Q. In other words, you use a suction pipe?

A. That is about—you could term it that, yes.

Q. And in your opinion a suction pump will raise all the gold values that are in the ground, would it?

A. To the best of my knowledge it does.

Q. And you wouldn't condemn a dredger that operates on a suction principle, would you?

A. I have never seen one that operates successfully. [259]

Q. What is the difference between the suction dredge and the suction process that you used in lifting this material out of the pipe?

A. You see, this pipe is confined to a very small area; you can control it to the extreme. Whereas with the suction dredge you are working around promiscuously under water, and you don't know whether you are recovering the total area or not.

Q. Well, do you know when you pump out this pipe that you are pumping anything else besides the contents of that pipe?

A. No, not ordinarily, you don't.

(Testimony of Arthur F. Bishop.)

Q. In other words, if you were in a sand, you might pump sand from underneath the pipe?

A. Occasionally that is done, and they have to make provision in the calculations to take care of such a condition as that.

Q. But fundamentally, both the suction dredge and the process used for the removal of this core, are both suction processes?

A. They are both suction processes, yes.

Q. And do you know the pounds per square inch of suction in the process that you use?

A. No.

Q. It is the vacuum process, isn't it?

A. That is what it amounts to.

Q. In other words, it wouldn't exceed 15 pounds per square inch, would it?

A. Well now, I wouldn't venture to state in that regard.

Q. Well, the highest pressure you can get in a vacuum is 15 pounds per square inch of suction, isn't it?

A. Well, that I don't know.

Mr. Cornish: No further cross examination, your Honor.

Redirect Examination

Mr. McMillan: Q. Mr. Bishop, you heard Mr. Wiltsee's testimony in this case with reference to the manner of his having [260] drilled the test holes on the property here under consideration?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. The manner in which he did it. Were the test holes drilled here in a similar manner?

A. Yes, sir.

Q. You adopted precisely the same method?

A. Yes, sir. That is the accepted method of prospecting.

Mr. McMillan: That is all.

Recross Examination

Mr. Cornish: Q. One question: Mr. Bishop, did you compute the average value per cubic yard that your tests indicate? A. Yes, sir.

Q. What was that?

A. I arrived at 34.1 per cubic yard.

Mr. Cornish: 34.1. That is all.

(Witness excused.)

Mr. McMillan: Call Mr. Smith.

RICHARD G. SMITH,

Called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Mr. Richard G. Smith? A. Yes, sir.

Q. Now, Mr. Smith, what is your occupation?

A. Mining. My present position is the manager of the Natomas Company, gold dredging department.

(Testimony of Richard G. Smith.)

Q. That is one of the larger companies in Northern California engaged in gold dredging?

A. That is right.

Q. And where is its principal office?

A. Our main operating office is in Natomas, just outside of Folsom; the main office of the company is located here in Sacramento.

Q. You have several dredging plants, have you?

A. We have. [261]

Q. How long have you been the manager of the company?

Mr. Cornish: I will state, Mr. McMillan, as to this man's qualifications in gold dredging—

Mr. McMillan: Well, I would like to qualify him generally, for the information of the Court.

Q. You are also a mining engineer, are you not? A. Yes, sir.

Q. And just state for our information how much experience you have had in mining and dredging.

A. Since graduation from Stanford in 1909 I have been engaged exclusively in placer mining. I have been with the Natomas Company since 1912, during which time I have been in charge of all their prospecting and their engineering, up to the present position, which I hold, as manager of the gold dredging department.

Q. You are acquainted with Mr. Giddings and Mr. Dorian and Mr. Bishop? A. Yes, sir.

Q. And, in fact, you had something to do with the making of those tests yourself, did you not?

(Testimony of Richard G. Smith.)

A. To the extent that that crew that put down those holes was a crew that had been working for us.

Q. For the Natomas Company?

A. For the Natomas Company.

Q. Yes.

A. And that the equipment was actually the property of the Natomas Company.

Q. Mr. Smith, your company has dredged a great number of, in this vicinity, have they not, gravel bars? A. Yes.

Q. In on the middle fork of the American?

A. No, sir.

Q. In that vicinity? A. No, sir.

Q. Tell me some of the bars that you have dredged.

A. The only bars that the Natomas Company have dredged have been located right out here out of Folsom under this management. We have also dredged—I will limit that—make an explanation, [262] rather, of that: The Natomas Company is also dredging in Oroville; they have three dredgers up there that are more or less operating in so-called bars along the Feather River. Their principal operations, of course, have been right up here near Folsom.

They have also been interested in operations on the Merced River in California.

Q. Well, you are familiar also, too, with the dredging operations of other companies up in the Northern California area? A. That is right.

(Testimony of Richard G. Smith.)

Q. The dredging operations of such companies as—you could name a few of them?

A. Well, I could probably name all of them with a little thought. Our connections have also been, as I said, on the Merced—the San Joaquin Mining Company, the Merced Dredging Company, are subsidiaries of the Natomas Company; the Yuba Manufacturing Company of the Yuba Consolidated Goldfields we have been more or less in close touch with. Our operations have been the same, to the same extent. The personnel have changed from time to time when management has been from one company to another.

Q. And you are familiar with the properties that they have dredged? A. That is right.

Q. Throughout Northern California. Are you familiar with the property here under consideration, the 40.34 acres of land?

A. From superficial examination only.

Q. You did make an examination of that property?

A. I saw the property and was there, that is all.

Q. And you are familiar with properties in that vicinity, are you? A. Yes.

Q. And up and down the bar. Did you make an examination of that property for the purpose of forming an opinion of the market value [263] of it? A. Yes, sir.

Q. You are familiar with the prices paid for dredging property around California?

A. Yes, sir.

(Testimony of Richard G. Smith.)

Q. Your company has purchased properties, or handled properties on a royalty basis, have they not? A. Both ways.

Q. Many of them?

A. Quite a number of them.

Q. And you are familiar with those?

A. Yes, sir.

Q. And you have been in the courtroom all the while this case has been going on, and you heard the testimony that Mr. Wiltsee gave with reference to the tests made upon that property?

A. Yes, sir.

Q. And you are also familiar with the test that the Government made upon that property?

A. I am.

Q. The testimony has been introduced here. You heard the testimony of Mr. Wiltsee with reference to the proper method of recovering the gold up there, as to dredging. Do you approve of the method that he testified to?

A. I do, absolutely.

Q. And in your opinion would it require a dredger of the capacity to which he testified to dredge that property?

A. I believe that would be the most efficient size as far as that property is concerned.

Q. Well, in going over that property, and by reason of your experience and investigations in dredging matters, could you tell us whether or not that property is easily accessible, and whether it affords very easy facilities for being dredged

(Testimony of Richard G. Smith.)

feasibly and economically—or, on the other hand, are there any drawbacks that might require greater cost?

Mr. Cornish: Objected to, if the Court please, on the ground it is compound and complex and indefinite. As to the witness testifying what the cost would be I have no objection, but I [264] think——

Mr. McMillan: I withdraw the entire question.

Q. By reason of your experience and familiarity with dredging and the operation of dredgers please state whether or not the property here under question could be dredged with the easiest facility.

Mr. Cornish: To which we object again, if the Court please, on the ground that the question contains a relative term—"with the easiest facility."

Mr. McMillan: Strike out the word "easiest."

Mr. Cornish: And the same objection to the word "facility"; it is a relative——

Mr. McMillan: Withdraw the question.

Mr. Cornish: It is a comparative expression, Mr. McMillan.

Mr. McMillan: Withdraw the question.

Q. Will you please state in your own way, Mr. Smith, the condition of that property as you observed the property and from your experience as to dredging?

A. The property is not the easiest dredging property that has been in the State of California. I think that is readily—would be readily acknowledged by anyone conversant with dredging. The

(Testimony of Richard G. Smith.)

problems that arise on that do not arise in the districts that the Natomas Company are dredging in around Folsom. There are many problems presented in a river channel that we don't possibly experience in open field work such as in the fields of Folsom. For that reason there are conditions that must be considered in connection with the operation of that property and placing a value on that property.

Q. What are some of those problems and considerations?

A. Well, the problems have been, as outlined by Mr. Wiltsee, to the extent that the dredge that must be put on there is more adapted to a dragline operation than it is to a bucket line [265] operation. The dragline operation is more expensive to operate than a bucket line operation. The other conditions that exist are, on account of the confined channel to which that river is limited, it is necessary, and will be necessary at certain times of the year, to keep your dredge protected from flood conditions. There is another condition there that causes trouble from dredging operations. Whenever there is stream pollution in the State of California it must be taken into consideration. It is almost impossible to dredge in the streams of California at the present time without polluting a river which goes into a navigable river, the Sacramento River, and for that reason conditions must be taken care of——

Q. As to its accessibility?

(Testimony of Richard G. Smith.)

Mr. Cornish: I will stipulate, Mr. McMillan, the Court can form its own opinion as to whether the property is accessible.

Mr. McMillan: Q. I am speaking from the dredger man's standpoint.

A. Obstacles, as far as accessibility, are not insurmountable. It will cost more money. Dredgers have been taken to such places as New Guinea, where they have had to be flown in with planes. So I wouldn't say that there is an insurmountable obstacle.

Q. Do you agree with Mr. Wiltsee's opinion that the dredging outfit should be of the size he testified to, to go in there?

A. I believe that would be the most efficient.

Q. Do you agree with him on the cost of such equipment? A. I do.

Q. That was about \$140,000, wasn't it?

A. Yes, sir.

Q. Now, Mr. Smith, by reason of your experience and investigation and familiarity to which you have testified as to mining properties, and by reason of your having seen this property, familiarity [266] with the tests which have been made, and having heard all the testimony in that regard in court, and keeping in mind the enhanced value of that property by reason of its having gold bearing gravel, and taking, if you please, the cubic yardage given by Mr. Wiltsee, 600,000 cubic yards, have you formed an opinion as to the market value of that property as of October 10, 1939? Before

(Testimony of Richard G. Smith.)

answering that question I would like to ask you one or two more preliminary questions.

Mr. Cornish: May it be stipulated, Mr. McMillan, that our objection that we made before to this line of testimony, stands.

Mr. McMillan: Yes.

Mr. Cornish: And similarly ruled upon the Court?

Mr. McMillan: Yes.

Q. Mr. Smith, to what uses could that property up there be put at present or in the reasonably near future—what uses is the property capable of being put to?

A. Well, the principal use that I would say that property could afford to anyone would be for mining purposes.

Q. It is not good for grazing, or a summer resort, or fishing, or hunting, or any other use but mining?

A. Well, the value for that purpose, I would say, would be very small.

Q. The highest and most profitable use to which the property could be put would be for mining?

A. That is my opinion.

Q. Now then, have you formed an opinion as to the market value of that property, taking into consideration all its uses, and the most profitable use to which it could be put?

A. I have.

Q. And taking into consideration the enhanced value that I spoke of a moment ago?

A. I have.

(Testimony of Richard G. Smith.)

Q. Now tell us, please, what, in your opinion, was the fair market [267] value of this subject property—that is, the 40.34 acres of land—on October 10, 1939, the date when the summons issued in this action?

A. It is my opinion the fair market price for that property would be \$12,000.

Q. You understand in arriving at that opinion that market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted, and to which it is capable of being used? You understand that? A. Yes.

Q. You have taken that into consideration?

A. Yes, sir.

Q. I assume that a man in a dredging business like yourself, that if you had an easement on there for two years, with the right of taking the gravel and everything off of there, that you could take it all out, could you not? A. That is right.

Q. You would therefore take out the full value?

A. That is right.

Q. But supposing that on that property an easement for two years was given, with a right to use the property and to take gravel and sand, and the gravel would be ore-bearing, and not a thing was taken off the property by the person who had the easement—nothing whatever was taken out; he was simply in the occupation and possession of

(Testimony of Richard G. Smith.)

that property for one year and eleven months—what would you say was the fair market value of the use and occupation of that property during that period?

A. It would be my opinion that the fair interest rate on that valuation would be just compensation.

Q. Well, in your opinion, what have you in mind by a fair and reasonable rate of interest—seven percent? You are figuring on the investment value. What would you say was a reasonable rate [268] of interest?

A. I don't believe I am capable of answering that.

Q. I see. But by a reasonable rate you mean as obtains in the business world, from four, five, six, to seven percent?

A. That is my impression, yes.

Mr. McMillan: Yes. That is all.

Take the witness.

Cross Examination

Mr. Cornish: Q. Mr. Smith, I take it from your answer that if you owned this property and the Government took possession of it for a year and eleven months and excluded you from mining the property, that you would be satisfied to take interest at some rate on \$12,000, and feel that you had been adequately compensated?

A. That is right.

Q. And I take it also from your testimony that

(Testimony of Richard G. Smith.)

you would be perfectly willing to buy this property for \$12,000? A. That is right.

Q. Now, have you operated, in the course of your experience, any stationary gold recovery plants? A. No.

Q. As a matter of fact, you wouldn't mine this property with a stationary gold recovery plant, would you? A. No, sir.

Q. And you wouldn't be particularly interested in any plans if you were the owner of it that required you to recover the gold from that property with a stationary gold recovery plant, would you?

A. I would say that question is too broad for me to answer.

Q. Well, let me put it this way: In your judgment, Mr. Smith, what would it cost to excavate 100,000 yards of that bar, hoist it up to a height sufficient to run it through gold recovery devices by force of gravity, to furnish the water and furnish the [269] power, and take away the tailings?

A. I wouldn't definitely state a fixed price, but I would say it would exceed 10 cents a yard.

Q. It would exceed 10 cents a yard?

A. That is right.

Q. Now, Mr. Smith, from your examination of the gravels there, and from what you have seen of these tests, in your opinion, if the Government, if someone excavated 100,000 yards of that gravel, placed it at a height sufficient to run it by force of gravity through gold recovery devices, furnished the water and furnished the power and carried

(Testimony of Richard G. Smith.)

away the tailings, so that the only expense was the expense of operation, exclusive of water and power, of your gold recovery devices, what return would you expect to receive from the recovery of the gold in this 100,000 cubic yards?

A. You mean—by that do I gather you are asking what my opinion is of the value per yard of that gravel, that 100,000 yards?

Q. Well, let me withdraw the question. The tests indicated, Mr. Smith, to your knowledge, that this gravel averaged about 34 cents per cubic yard?

A. What gravel?

Q. The gravels in the bar, averaged throughout.

A. The gravel as a whole, yes.

Q. Yes. A hundred thousand yards of the average gravels put through concentrating devices, in your judgment, would net a recovery of about \$34,000?

A. That is right.

Q. If the power and water and the excavating and elevating and carrying away the tailings were furnished by someone, and you didn't have to pay for them, and an average run of the bar were taken, you would expect a net recovery from that hundred thousand yards of \$34,000?

A. With no expense your net would be thirty-four thousand.

Q. Now, you say you are familiar with the operation of the various [270] gold dredging companies?

A. Yes, sir.

Q. And you are quite familiar with the operations of the Yuba Consolidated?

(Testimony of Richard G. Smith.)

A. What do you mean by "quite familiar"?

Q. Well, do you know the type of work they are doing?

A. Yes, sir.

Q. Do you know anything of a recent purchase of any patented dredging equipment by the Yuba Consolidated?

A. No, sir, I wouldn't know that.

Q. You don't know whether, then, they have or have not recently purchased any patented gold dredging equipment that might or might not be an improvement over present methods?

A. No.

Q. Now, in your judgment, Mr. Smith, if you owned this property, and someone came to you and said that they wanted the exclusive right, independent of any interference from you, to remove gravel from this bar for a period of one year and eleven months, and to take such other minerals as they might see fit, what in your opinion would be a fair compensation to pay to you as the owner of that property for that right, given on the 10th of October, 1939, and to extend for a period of one year and eleven months thereafter?

A. \$12,000.

Q. In other words, you feel that in that time that they could take out everything that was in the property?

A. That is right.

Q. Now, you are familiar, are you, with any suction dredges that have been put on the market?

A. No, sir.

Q. Your operations have all been by bucket line dredges, haven't they?

A. That is right.

(Testimony of Richard G. Smith.)

Q. Your company doesn't even operate the dragline—— A. We have one.

Q. You have not operated any?

A. We own one, but have not any in operation. [271]

Q. But you have never operated a dragline equipment in gravel similar to this? A. No.

Q. From your experience with such equipment you don't know what would be the cost of operation for dredging per yard with that kind of equipment?

A. I am familiar with dredging operations.

Q. Those dragline equipment operations vary all the way from five cents to twelve cents, and sometimes higher, per yard?

A. That is right.

Q. Depending upon the problems that confront the particular equipment. Now, in your judgment, equipment suitable to operate this property would cost, you say, a hundred forty thousand dollars?

A. That was the figure Mr. Wiltsee gave, and I think it is very close to that size of equipment.

Q. All right. How long would that equipment last?

A. That depends a good deal on the operator.

Q. Assuming it was carefully taken care of.

A. The shovel equipment itself is generally depreciated over a period of four or five years.

Q. Four or five years. And what about the concentrator.

(Testimony of Richard G. Smith.)

A. Well, the washing plant itself is possibly good for 50 percent longer time than that.

Q. That would be somewhere around six to seven years? A. That is right.

Q. How long, in your opinion, would it require to mine this property with the equipment of the type we are now discussing?

A. Oh, possibly five months.

Q. Five months. Then the equipment would not be, by any means, worn out in mining this bar?

A. That is right.

Q. And while the equipment would cost \$140,000 if purchased new, [272] it would have considerable salvage value when the operations were completed, would it not?

A. There is a lot of them in California.

Q. There is a lot of them for which there is no sale at all? A. No sale.

Q. Well, that situation is brought about by the inability of operators to mine gold, isn't it?

A. That is one reason.

Q. And I presume that similar equipment could be purchased second-hand at a figure a good deal less than \$140,000?

A. I wouldn't doubt that at all.

Q. What, in your opinion, would be the fair market value of equipment of that sort after it had been operated for six months, say?

A. That is entirely beyond answering without seeing the equipment.

Q. Assuming equipment that has been carefully handled, or handled in such manner that the shovel

(Testimony of Richard G. Smith.)

would wear out in four to five years, and the washing plant in six to seven and a half years. In other words, approximately one-eighth to one-tenth of the use of the shovel expired, and one-twelfth to one-fifteenth of the use of the washing plant.

A. I wouldn't put a price on that, Mr. Cornish.

Q. As a matter of fact, that equipment, or equipment of the type we are discussing, could be purchased—equipment suitable for mining this property could be purchased for a good deal less than \$140,000?

A. I don't doubt that.

Q. And you don't know for how little?

A. No, sir.

Q. You don't know of any suction process, in your experience, that recovers all the gold, do you?

A. No, sir.

Q. No matter what sort of suction method you use, a certain amount is not picked up by suction?

A. When you talk about [273] suction process, probably you aren't confining your statement to the extent I could answer that.

Q. Well, is it possible to raise coarse gold by suction?

A. A certain distance.

Q. How far?

A. I wouldn't state how far.

Q. Could you raise it 10 to 15 feet?

A. No, I don't think so.

Mr. Cornish: That is all.

Mr. McMillan: That is all.

(Testimony of Richard G. Smith.)

And the Government rests, may it please your Honor.

(Witness excused.)

(Government rests.)

Mr. Cornish: May it please your Honor, with respect to rebuttal to be offered by the defendants—I hadn't expected the Government to rest so soon, and I doubt if I could produce any rebuttal witnesses by two o'clock this afternoon, and I hesitate to impose upon the Court for an adjournment until Monday, but I think we can, by reviewing the evidence this noon, ascertain what, if any, rebuttal we do want, and it may be by two o'clock we will decide we will not put any on. So would it be an imposition on your Honor to ask that the matter be adjourned until two o'clock, and we, at that time, notify the Court as to whether we will desire any rebuttal? I realize, your Honor, I should be ready, but seeing the raft of Government witnesses here in the courtroom, I assumed there would be——

Mr. McMillan: You mean an array, Mr. Cornish, not a raft.

Mr. Cornish: Well, we will call them an array.

The Court: Two o'clock?

Mr. Cornish: Yes.

The Court: Such will be the order.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [274]

Friday, November 19, 1943

2:00 o'clock p. m.

Mr. Cornish: May it please your Honor, in reviewing the testimony during the noon hour, I recall that the United States Engineer who identified this map which is on the board, the Plaintiff's Exhibit No. 3, testified—whether he did so inadvertently or not—that the north and south boundaries as shown on that diagram were not necessarily accurate; that the south boundary might be moved further south, and that the north boundary might be moved further south.

Your Honor has in evidence the survey of the property made by Mr. Wiltsee, or under his direction, and Mr. Wiltsee's survey corresponds more with our theory that the boundaries of this property should be moved further to the south.

In other words, as Mr. Wiltsee's survey shows, the north line of the property would run about as I am indicating with the pencil (indicating on map), possibly three to four hundred feet further south than is shown on this diagram, and similarly the south boundary of the property would run three to four hundred feet further south than the south boundary as shown on this diagram.

It makes this difference, your Honor: It increases the area of that portion of the bar which is on the south side of the middle fork of the American River. Three of Mr. Wiltsee's test holes were sunk in locations which, according to the diagram which is on the board, would not even be on

the property as shown on the United States Engineers' map.

The testimony we would offer by way of rebuttal is to call as a witness Mr. Allen H. Millborn, who made the survey of this property in 1934 which I have before me, which has not yet been [275] offered in evidence because not identified, a diagram showing the north and south boundaries and the dimensions and directions of each, and according to this diagram the boundary line runs more in accordance with Mr. Wiltsee's survey than it does with the United States Engineers' survey.

The practical effect of that, your Honor, is to increase the volume of gravel in the 40 acres by somewhere between 75,000 and 100,000 cubic yards, which would account for the difference in volume as computed by Mr. Wiltsee and as computed by the United States Engineers. The figure of the United States Engineers is 527,000 cubic yards of dredgable gravel on the property, and Mr. Wiltsee's figures are 600,000 cubic yards of dredgable gravel on the property.

Mr. McMillan, in his questions concerning the value of the property has proceeded upon the theory, or has framed his questions predicated upon a gravel volume of 600,000 cubic yards.

Your Honor will recall we objected to that testimony; that we took the position that in a case of this sort, that where the Government condemns the mineral rights in the property as distinguished from the property itself, that the test of value is not the market value of the property, but is the

value of the minerals within the property, which minerals the Government, by this condemnation proceeding, has the power to take if it sees fit to take them.

Consequently, to corroborate Mr. Wiltsee's testimony, we would like to, if your Honor would grant a continuance for that purpose, produce the surveyor,—or if the United States is willing, that we offer in evidence this survey made by Mr. Millborn, with the stipulation that if called Mr. Millborn would establish that he was an experienced surveyor,—that is, he [276] would have the minimum qualifications necessary in order to qualify him to testify to a survey—and that if called he would establish the boundaries to be shown as in this diagram.

Now, we feel that is material, because we are going to ask the Court for permission to submit written authorities on the question of the measure of damages in this case, and we would like to corroborate as strongly as possible our theory of the value of the gravel, our contention being that the test of the measure of damages is based upon the mineral resources which could have been withdrawn from that total amount of gravel had the Government not interfered and retained possession of the property.

Now, either I would like to call Mr. Millborn, or if the Government would stipulate that Mr. Millborn, if called, would identify the boundaries on this diagram.

I would like to offer the diagram, your Honor, and then rest.

Mr. McMillan: May it please your Honor, we will neither stipulate nor consent to a continuance for that purpose. That was part of counsel's case in chief, to establish his area. It isn't proper rebuttal. He put his witness on, Mr. Wiltsee, and based on his survey thereof, 600,000 cubic yards—your Honor will recall we disregarded the survey made by the Government, 527,000 cubic yards, and my questions to my witnesses in fixing value and in forming their opinion was based upon that testimony, the testimony of Mr. Wiltsee, on the area of 600,000 cubic yards.

Now, it would be an awkward situation to grant a continuance as counsel suggests, and get testimony that would put awry all the questions we asked the witnesses as to the market value.

To refresh your Honor's recollection, every witness in that regard, we took not our figures; we took the figures of defense [277] counsel in this matter, and his survey, which was introduced under the testimony of his witness, Mr. Wiltsee, and we based our questions upon 600,000 cubic yards, and not 500,000 cubic yards, as shown by our survey.

We object to the introduction of this; we will not stipulate to it and we will not consent to a continuance of the case for that purpose; that at most it is to corroborate a witness, as counsel has stated, who has already testified for the defense. It is a part of the case in chief, to start in with, and it is not in rebuttal.

Mr. Cornish: May it please your Honor, the interesting feature of this survey by Mr. Millborn is that so far as the south boundary of the property is concerned—the survey submitted by the United States Engineers, as far as the southwest corner of the property is concerned, and as far as the direction and the distance—the length of the southern boundary is concerned—checks almost within a foot and a half of each other. The direction is substantially the same, and the boundary—the corners are substantially the same, the main difference being that the Government, by its survey, tilts the property slightly to the west at an angle of about two degrees from the directions as shown by Mr. Millborn's survey, but the main difference in the survey lies in the position of the river as shown on that diagram.

Now, your Honor will recall that the plaintiffs offered in evidence in their preliminary case a diagram which shows the middle fork of the river coming—this dimension at the top is 643 feet, as their survey shows, approximately 300 feet from the northeast corner, and the second map they have shows that this dimension is 140 feet; shows the river coming approximately 600 [278] to 650 feet from that corner (illustrating on maps).

Now, it is material in this, your Honor: that this survey which was introduced contrary to the diagram that was introduced in the preliminary case moves the property, the entire bar, along with that bar to the west of the river, 300 to 400 feet to the south. We feel that while it is true we were

entitled in our case in chief to submit any survey that we saw fit, that the Government, having departed from its original theory on the position of this bar, and placed it, by a survey, 300 to 400 feet south, by a witness who could not identify the boundaries, saying that the diagram was made to survey the bar, not for the purpose of showing the boundaries, that it is proper rebuttal for us to show where, in truth and in fact, those boundaries do run, with those two bars on this river.

I had never dreamed, when we put on our case in chief, that the Government would produce two surveys that were so entirely different.

Your Honor will recall when the case opened that I questioned Mr. McMillan and the witness about where the west bank was, and I called their attention to the fact that this Exhibit No. 1 showed the west bank of the river running clear over the west boundary of the property, and I informed them that it was the defendants' contention that the river was entirely in the property, coursed through and did not leave the property until near the southern end, and in my questioning it was determined that this island that is on here had been sketched by someone's estimate after looking at the property, and had not been put on by any accurate measurements being taken.

Your Honor was on the property. Your Honor will recall seeing this island (indicating). On this diagram it is almost due west of [279] the cabin, and on the property it doesn't come down anywhere near the cabin (illustrating on map).

So in the Government's case, which has established a survey from which it has departed in offering Plaintiff's Exhibit No. 3, and I feel it is proper rebuttal—it is to rebut that testimony by showing where, in truth and in fact, these boundaries do fall.

That is the only thing I have in the way of rebuttal, and it is the matter of a difference between—at least a difference between the computation of yardage made by Mr. Wiltsee and the computation of yardage testified to by the United States Engineers.

In my judgment, the testimony of the United States Engineer is not particularly credible. I don't mean to infer that the witness testified to an untruth. Perhaps he was only confused, and perhaps apologies will be made for his confusion. But he did testify positively, as your Honor will recall, that he couldn't say that the north and south boundaries were actually fixed with reference to their position on the bar; that he was concerned primarily in surveying the gravel for the test holes in respect to their position in respect to the river, and not in respect to their position in respect to the north and south boundaries.

It will only take about 15 minutes of the Court's time to establish that. The testimony will be that the boundaries are shown on this diagram, and unless the plaintiff will stipulate that the witness, if called, would substantiate that fact, I would like the privilege of calling him, for if our theory is correct that the damages are to be measured by

the gravel in the bar, it is a matter of a difference of at least 100,000 cubic yards——

Mr. McMillan: One moment. 100,000 yards between the map you just introduced by your own witness—— [280]

Mr. Cornish: There is a difference in area of approximately 75,000 yards between the map introduced by the Government and the map introduced by us, and 75,000 yards on the value fixed by the witnesses, 35 cents one witness said, and 34 cents another witness said, there is substantially \$25,000 worth of gold that would be recovered from that property, based upon the analysis of the drill tests by Mr. Wiltsee and by the United States Government.

Now, if this measure of damages—if it is predicated—we are not contending that we are entitled to the gold value of the property. As I stated to your Honor in the opening statement, we contend that since the primary, highest and best use to which this property could be put is mining property, that we are entitled to a measure of damages based upon mining property; that since the uncontroverted testimony shows that the defendants were prepared to mine it, had even taken an option on dredging equipment, for which they agreed to pay \$28,000, which they abandoned because the Government contemplated the condemnation of the property and they didn't want to invest that money in machinery and be held up by condemnation proceedings, they proceeded in good faith, and they abandoned the project, the damages should be based

upon the interest during the time they were delayed in enjoying the property upon the net profit it is reasonable to believe they would have derived, and all the witnesses testified concerning that, that within the period that the Government held them from possession they could have mined, completely mined, all the gravels in this property. In other words, had the Government stayed off, and the testimony is before your Honor, these defendants would have entered upon the property, put on the necessary machinery, mined and recovered the gold.

Now, with the war on, they are unable to get parts, and they [281] are unable even to get a permit to mine where the primary commodity which they seek to recover is free gold.

It is our contention that under those circumstances they are damaged to the extent of the interest on the profit that they would have derived from the use of this property as a mining property had they not been interfered with by the Government, and had the Government not taken possession and deprived them of possession.

So to that extent, and the extent of the recovery they would have derived from that additional ground, I feel the evidence is highly material, and it is rebuttal, because in introducing in evidence Plaintiff's Exhibit 3, the Government has definitely departed from the map offered in its preliminary case, where it shows that the river runs within 300 feet of the north boundary, and then introduced another exhibit which purports to show it runs 600 feet from the north boundary.

Mr. McMillan: May it please your Honor, your Honor will recall very well in reference to the map that was introduced upon the preliminary showing, I stated to the Court it was simply to inform the Court of the general location and of the nature of the project, because I expected that your Honor would be going up there to view the premises. We never used that map for any purpose except to point out for the Court's information, for illustration, about where the project was, and the general location and general nature of the project; but as to a survey of the quantity of gravel, or anything of that kind, no use was made of it.

I object further to the introduction of this testimony, may it please your Honor, on the ground it is not proper rebuttal, and it is impeachment of their own map and survey which they have [282] introduced in evidence under Mr. Wiltsee and led us to accept the 600,000 cubic yards as the basis of our putting our questions to our witnesses upon the market value of the property, and this is a late stage to come in and seek to impeach their own map and disarrange the questions which we have asked, where it was a part of their case in chief, and I accepted Mr. Wiltsee's survey as the survey they were going to follow through.

Now they are coming in with this for what? To corroborate Mr. Wiltsee's map, apparently. There doesn't seem to be any great disagreement between this map and the one they are going to show, and having used that survey to show not the meets and bounds of the property—the property is 40.34 acres

of land—that survey was introduced to show the full quantity of gravel, 8.10 acres of land.

The Court: The objection is sustained.

Is the case submitted?

Mr. Cornish: Will your Honor ask that we submit written authorities?

The Court: Yes, I was going to ask you submit it on briefs.

Mr. Cornish: Today is the 19th.

Mr. McMillan: I might state, your Honor, in case I lose sight of it, I just received a telephone call—I couldn't find the latest issue of the Federal Supplement, but I have noted the case down—I have a memorandum made of this case—Mr. Martin telephoned it to me from San Francisco—51 Federal Supplement, page 726, a condemnation proceeding brought under the Rivers & Harbors Act, I was told, in which the property sought to be condemned was timber and power and other personal property, and it was held there because it was under the Rivers & Harbors Act, not a declaration of taking, which vested title, there is no title [283] vested until the judgment was entered, and therefore they had a right to abandon it at any time before that, and there was no taking until the judgment was entered.

I just give that memorandum to your Honor now in case I should lose sight of it.

Mr. Cornish: Might the defendants, your Honor, have 15 days to submit the opening authorities?

The Court: Yes.

Mr. McMillan: 15 days, may it please your Honor?

Mr. Foley, is that satisfactory?

Mr. Foley: Yes.

Mr. Cornish: And by that time, your Honor, I can either submit the answer in 10 days, or I will be in the Army, I don't know which, but I will let your Honor know. I will either notify your Honor at the end of 30 days that I will not submit a reply, or I will submit it 10 days thereafter.

Mr. McMillan: As it stands now it is 15 and 15.

Mr. Cornish: 15, 15, and 10 if we desire.

The Court: Yes.

(Testimony Closed)

[Endorsed]: Filed Nov. 26, 1943. [284]

[Endorsed]: No. 11142. United States Circuit Court of Appeals for the Ninth Circuit. *F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel, Appellants, vs. United States of America, Appellee.* Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed September 17, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11142

F. M. O'CONNOR, et al,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Statement of Points on Which Appellants Intend
to Rely on Appeal and Designation of Portions
of the Record Necessary for the Consideration
Thereof.

A. Points on Appeal

By summary order for immediate possession pursuant to U. S. Code Title 33, Section 594, the United States seized real property of the defendants. The complaint described the quantum of estate taken as (1) the right to possess the property for a two year period commencing when suit was filed, and (2) the right, during that period, to take gravel and gold therefrom for use in the construction of a proposed and authorized debris dam.

The Court erred:

1. In awarding the defendants compensation only for the possession of the property and denying compensation for the intangible profit a prendre taken.

2. In admitting evidence of market value of land in which the United States sought only temporary possession and an incorporeal profit a prendre.

3. In permitting the United States to prove it did not enjoy the incorporeal right to the extent it was defined in the complaint.

4. In permitting the United States to prove a predetermined, unexpressed intent to enjoy the incorporeal profit a prendre to the extent less than that right was defined in the complaint.

5. In rejecting proof offered by the defendants that the extent of intended enjoyment of the incorporeal profit a prendre varied even after the United States entered into possession.

6. In rejecting proof offered by the defendants of negotiations preceding filing of suit in which the United States refused to define the extent of the incorporeal profit a prendre.

B. Appellants Designate the Following Parts of the Record Necessary for the Consideration Thereof

1. The complaint.
2. The order for immediate possession of the premises in issue.
3. The answer to the complaint.
4. The declaration of abandonment.

5. The motion to dismiss after abandonment.
6. The order denying motion to dismiss following abandonment.
7. The opinion of the Court.
8. The findings of fact and judgment.
9. The notice of appeal.
10. The phonographic reporter's transcript of the evidence taken at the trial.
11. Clerk's certificate.

Dated: September 26, 1945.

FRANCIS T. CORNISH

Attorney for Appellants R. J. Miedel, W. H. Morrison, F. M. O'Connor and Stella M. O'Connor.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed September 27, 1945. Paul P. O'Brien, Clerk.

No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR,
W. H. MORRISON and R. J. MIEDEL,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for
the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

FRANCIS T. CORNISH,
American Trust Building, Berkeley 4, California,
Attorney for Appellants.

FILED

DEC 1 2 1945

PAUL P. O'BRIEN
CLERK

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No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR,

W. H. MORRISON and R. J. MIEDEL,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for
the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

STATEMENT OF APPEAL.

Appellants appeal from a judgment of the District Court of the United States for the Northern District of California, Northern Division, awarding compensation in the sum of \$1745, with interest from October 17, 1939, on that sum as "just compensation" for the possession from October 17, 1939 until September 13, 1941 of a parcel of real property containing gravel and gold, but denying compensation to them for the taking of a profit à prendre to remove gravel and gold therefrom during that period, as a part of which right, and as incident thereto, appellants were excluded from the right to mine that property for that period.

The reasons given by the District Judge for denying compensation, and as found by him were

“that plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff
* * *

That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land * * *

Defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941 * * *

That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself.”

(T. R. p. 87.)

Appellants contend that these findings resulted from a misconception by the District Judge of the nature of the action before him, and of the nature of the right for which appellants sought compensation. The District Judge tried the case, made his findings and rendered his judgment under the misconception that he was sitting as a Court of Claims to determine the actual monetary damages which appellants sustained as a result of the limited exercise by the United States of America, respondent, of the rights and

privileges taken, rather than as a trial Court sitting to determine the cash value of the rights and privileges taken at the time that they were taken; that the findings and judgment of the District Judge disregarded uncontroverted testimony that the rights and privileges at the time they were taken had a cash value equal to the value of the fee itself; that this disregard of testimony was the result of a determination, not of injury in law when the rights and privileges were taken, but of monetary loss in fact after the rights and privileges taken had expired and respondent had, through no fault of appellants, failed to enjoy those rights and privileges to the full extent that they were taken.

This misconception on the part of the District Judge can perhaps be understood more clearly by an analysis of the pertinent facts disclosed by the evidence.

STATEMENT OF FACTS.

By Public No. 409-74th Congress, H. R. 6732, approved August 30, 1935, Congress authorized the construction of the so-called "Ruck-a-Chucky Debris Dam", which is more particularly set forth in "Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress". In substance, to the United States Engineers was entrusted the responsibility to thereafter (1) select a site for a debris dam on the Middle Fork of the American River, (2) design it, (3) secure contracts from hydraulic miners above the dam to store tailings behind it and pay therefor

a sum which would pay for the dam in 20 years, (4) secure the necessary materials for its construction and (5) award the contract to a civilian contractor and supervise its performance. Upon the Attorney General was cast the burden of bringing such actions under Title 33, Section 591 et seq. of the United States Code as might be warranted.

After Congress acted, the United States Engineers selected the Ruck-a-Chucky site and designed a dam at that location. (T. R. p. 95.) In their search for materials, and especially concrete aggregates, the engineers cast their eyes upon a gravel deposit located on the east half of the west half of the southeast quarter of section 23, township 13 north, range 9 east, Mount Diablo Base and Meridian. From this land they anticipated removing at least 75,000 cubic yards of sand and gravel for use as concrete aggregates (T. R. p. 106) although the exact amount, or the full extent of the gravel uses were never determined. (T. R. pp. 110, 118.)

Appellants' own certain interests in and rights to that land, the 40.34 acres of land in the counties of El Dorado and Placer, State of California, the subject of this action.

Respondent, the United States of America, brought this action October 10, 1939, pursuant to U. S. Code Title 33, Sections 591 et seq. to condemn certain interests in that land of the appellants and other defendants, of which defendants only appellants have any right or title to the property, and pursuant to U. S. Code Title 33, Section 594, obtained an order

on October 17, 1939, putting respondent in possession to thereafter enjoy those rights condemned. (T. R. pp. 38-40.)

Appellants are four, F. M. O'Connor and Stella M. O'Connor, his wife, R. J. Miedel and W. H. Morrison. (T. R. p. 90.) The O'Connors are now cotenants of an undivided one-half interest in the land itself, and R. J. Miedel is now their cotenant, owning the other half. (T. R. p. 277.) R. J. Miedel and W. H. Morrison are lessees of the sole and exclusive mining rights in the property. (T. R. pp. 58-74; 227-228.) The lease dates back to 1934, and was in effect when the action was filed. (T. R. p. 357; 58-74.) At that time the claim of ownership of F. M. O'Connor, Stella O'Connor and R. J. Miedel arose out of a mineral location claim, which ripened into a land patent August 28, 1940, after this suit was filed. (T. R. p. 277.)

The real property involved was viewed by the Court. (T. R. pp. 143-147.) It is oblong in shape, measuring approximately a half mile long from north to south, and an eighth of a mile wide, from east to west. Topographically, it is a U-shaped trough, formed by precipitous slopes along its east and west sides, and bottomed by a gravel bed approximately 500 feet wide from east to west, and extending nearly the length of the property from south to north. This gravel has been deposited there in olden times by the flow of the Middle Fork of the American River which enters the property flowing west near its northeast corner, nearly crosses the gravel deposit, and then turns abruptly to flow south just within the westerly edge

of the property (T. R. p. 363) for about a quarter of a mile, and then turns to the southeast to traverse the property and to leave it at its southeasterly corner, dividing the gravel into two bars, referred to as the "upper bar", which lies to the east of the river, and the "lower bar" which lies to the west of the river. (T. R. pp. 143-147.) In reality it is but one deposit, as the stream itself passes over gravel. (T. R. p. 225), in some places as much as twenty feet in depth. The total volume of this gravel is variously estimated from 527,000 cubic yards to 1,400,000 cubic yards (T. R. pp. 241-242), but assumed by attorney for respondent in his hypothetical questions as containing 600,000 cubic yards. (T. R. pp. 372, 424.)

This gravel varies in depth from 12 feet to 30 feet (T. R. pp. 322, 326, 392), and water permeates it at its lower depths. (T. R. p. 178.) It is a loose flowing and "free running" gravel. (T. R. p. 312.) The gravel is gold bearing throughout. (T. R. pp. 322-326; 387-410.) Drilling tests establish recoverable gold of the value of 33¢ to 35¢ per cubic yard to be contained (T. R. pp. 322-337; 387-410; 417), and tests performed by the defendants establish higher values to be present. (T. R. pp. 179-190; Def's Ex. A, B, C, D, E, F, G, H.) The highest and best use to which the property can be put is dragline dredge mining. (T. R. pp. 372, 412, 425.) It has no value for any other purpose except the removal of concrete aggregates, if there were any local demand for aggregates, which there ordinarily is not.

The value of the land itself, as mining ground, on October 10, 1939, and on October 17, 1939, was \$12,000.

(T. R. pp. 382-383; 426.) It could have been mined and all of the gold removed and recovered in five to six months (T. R. p. 432), and the value of the right to take both gravel and gold for a period of one year and eleven months was also \$12,000 on October 17, 1939. (T. R. pp. 411-412; 430.) The reasonable cost of recovering that gold at that time was 10¢ per cubic yard (T. R. p. 428), and a net profit to appellants in six months' time of 23¢ to 25¢ per cubic yard, or a total of \$138,000 to \$150,000, was reasonably to be expected. (T. R. p. 329.)

From 1934 to 1939 the property was involved in litigation. (T. R. p. 275.) As soon as this was completed the application for a patent, pending when this suit was commenced, was promptly forwarded to the United States Land Office. (T. R. p. 295.) In the meantime, appellants Miedel and Morrison had arranged for a dredge which they were prepared to purchase and install, (T. R. pp. 253-255, 281-282) but they delayed tying up their funds because respondent had threatened to preclude them from operating by taking exclusive possession by this action. (T. R. pp. 253-255, 281-282.)

They knew of this proposed exclusion because they were then negotiating with the respondent about the gravel on the land. (T. R. p. 278.) The respondent had searched the records for any claims against the land since 1850 (T. R. p. 283), and even joined all possible claimants as parties defendant, (T. R. pp. 2-37) although respondent knew that only appellants had any right to remove either gravel or gold. (T. R. p.

28.) In fact, respondent approached appellants to negotiate a purchase of gravel. (T. R. pp. 278-279.) Any royalty proposition was not acceptable, (T. R. p. 279) nor would respondent limit the right which it sought either as to quantity, area or depth. (T. R. pp. 207-212, 280, 282-284.) It asked for a price or terms under which it could, (1) take any quantity, (T. R. pp. 226-227), (2) take from any location, (3) take from any depth, (4) exclude appellants from recovering gold from anywhere on the property except as a corollary of the gravel extraction process, (T. R. p. 283) and, (5) that such rights and exclusions endure for two years. (T. R. pp. 207-212, 215-222, 280-284.)

These negotiations culminated in a series of three letters in which the appellants Miedel and Morrison offered the respondent the rights it sought for the payment of \$11,875, plus the obligation of respondent to furnish excavation, and elevation to the gravel removed, and water and power to operate gold recovery devices, and to remove the tailings from appellants' plant. The representatives of respondent "shook hands" with appellants on this deal, subject to confirmation from Washington, D. C. and authority to enter a consent decree accordingly. (T. R. pp. 251-252.)

Considerable time elapsed, during which respondents advertised for bids for the construction of the Ruck-a-Chucky Debris Dam by a contractor who should have access to appellants' gravel under the terms informally agreed, namely that the contractor furnish the exca-

vation and elevation of the gravel, the state water and power, and remove the tailings. (T. R. p. 215.) The contract was then awarded and the contractor desired possession of appellants' property. Since no formal agreement had been reached, condemnation and immediate possession was a necessary step.

To meet this emergency the respondent filed the complaint herein, setting forth that respondent is authorized, under U. S. Code, Title 33, Section 591, Public No. 409-74th Congress, H. R. 6732 and Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress,

“to acquire by purchase and condemnation any estate, right, title and/or interest in and to the real property * * * for the purpose of for a period of two years from and after the time of the granting and entry of an Order by this Court granting the United States of America immediate possession of said land, removing concrete aggregates therefrom and from out the same and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir.” (T. R. p. 5.)

and that the Secretary of War has selected for acquisition by condemnation,

“A right of uninterrupted use and occupancy of the land hereinafter described for a period of two years from and after the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand

and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir.” (T. R. pp. 6-7.)

Then follow certain provisions for the recovery of gold content of the gravel, hereinafter more specifically discussed, and concludes that the Secretary of War has further designated in the selection of the rights for acquisition:

“That in the event said owners * * * shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event, *plaintiff shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants.*” (Italics ours.) (T. R. pp. 9-10.)

The complaint continues with the allegation:

“That the estate or interest in and to the said land * * * which the plaintiff intends to seek, take, acquire, condemn, hold and own by these proceedings.” (T. R. p. 11.)

is the same right selected by the Secretary of War and herein immediately above set forth at length.

The complaint further sets forth that adequate funds are available to pay any award that may be made in the action out of an approved appropriation (T. R. p. 12), and that pursuant to U. S. Code, Title 33, Section 594, respondent is entitled to immediate possession of the land to the extent of the interest to be acquired (T. R. pp. 13-14), and that necessary formalities have been indulged to entitle respondent to an order for immediate possession. (T. R. p. 15.)

In addition to a prayer that the interest herein above described at length be awarded to respondent, the complaint contains the additional prayer that:

“such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.

That the Court adjudge and decree that whatever right or interest each or all of said defendants may have in and to said land be held in abeyance, and particularly each their right to the mining of said land, be held in abeyance for and during the said period of said use and occupancy of said land sought to be acquired herein shall continue, and that the Court likewise adjudge the value of any detriment suffered or to be sustained by said defendants, and each of them, by reason of such use and occupancy by plaintiff, and such holding in abeyance of any such rights that each said defendant, or any of them, may have to mine

said land as aforesaid, and that the award therefor when made and paid by plaintiff herein be adjudged and decreed to be the full and just compensation for the taking of said use and occupancy, as aforesaid.”

(T. R. pp. 32-33.)

To enable its contractor to take possession and commence operations at once, respondent petitioned the Court for, and the Court gave and made its order in these words:

“Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff be and it is hereby entitled to and shall be given immediate possession and use of the land described in the complaint herein, and hereafter described, and plaintiff is hereby authorized to take possession of said land to proceed with the public work thereon authorized by Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint.”

(T. R. pp. 38-39.)

Thereupon the contractor, armed with a copy of this order, took over the property (T. R. pp. 195-197, 205-206), stacked lumber on it, stored powder on it, cut and installed power poles and strung a power line (T. R. pp. 197-204; Def. Exs. I, J, K, L), took a small amount of gravel (T. R. pp. 256, 260, 271-272), and placed a lock on the gate, enabling only the contractor access to the property except appellant Morrison was given access to a cabin located thereon. (T. R. p. 206.)

Properly regulated, the excavation and elevation, the water and power, and the removal of tailings had a monetary value to appellants of ten cents per cubic yard (T. R. p. 222) if production was limited to 100 cubic yards per hour (T. R. pp. 221-223), but it was impossible for appellants to realize this value, or avail itself of the advantages contemplated because the contractor refused to restrict his output to a rate which the water and power furnished would handle. (T. R. pp. 223-224.) Therefore appellants could not, and would not meet the conditions set forth in the complaint:

“that in the process of removing said concrete, aggregates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in the manner as follows:

The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard $\frac{1}{4}$ " screen and a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed, and operated by the owner, and, except as specifically indicated below, without cost to the United States of America.

(A) All material will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material

amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard $\frac{1}{4}$ " screen;

(b) All material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery device in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install, and operate gold recovery devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen.

(b) A vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, but passes a standard 1" screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 percent."

(T. R. pp. 7-9.)

thus nullifying the option given to appellants, and bringing directly into being the alternative provided:

"That in the event said owners, R. J. Miedel, F. A. O'Connor and Stella O'Connor, shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engi-

neers, United States Department of War, then and in that event the plaintiff shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants.”

(T. R. pp. 9-10.)

Had it been possible to correlate the gravel separating plant with the gold recovery plant, and had construction proceeded as planned, the proposed cash consideration plus the obligations upon the contractor to excavate and elevate the gravel, furnish water and power, and remove the tailings would have resulted in a recovery to the appellants of \$34,000 in gold from the property without cost to them. (T. R. p. 429.) It would have absorbed what otherwise would have been an expense to appellants of \$10,000 to process that same gravel in order to recover that gold.

Had the respondent not obtained the order for immediate and exclusive possession and taken over appellants' property, appellants would have mined said property in a period of six months, and, during the time they were excluded from possession would have effected a net recovery, over and above the expenses of operation of \$138,000 to \$150,000. By deferring this recovery for one year and eleven months appellants have lost interest on that amount at 7%, or \$18,515 to \$20,125.

After hearing all the evidence, and the offers of proof, the Court awarded \$1745 damages (T. R. p. 89) for the bare possession of the property (T. R. pp. 87,

88), nothing at all for the incorporeal right to take gravel from October 17, 1939 to September 13, 1941 (T. R. p. 87), and nothing at all for the taking of the right to mine the property during that period. The reason assigned for awarding no recovery for the incorporeal right to take gravel was that none was in fact taken (T. R. p. 87), and that no market value was established for the value of the original incorporeal rights sought to be taken apart from the value of the land itself. (T. R. p. 87.) No reason was assigned for allowing no recovery for the deprivation of the right to mine.

ANALYSIS OF THE RIGHTS TAKEN.

In appealing, no attack is made upon the award of the Court for the bare possession of the property. In so far as the right of bare possession is concerned, the award was more than fair. Although no appeal has been taken therefrom, appellants hereby agree that if this Honorable Court reverses the judgment of the district judge because of his failure to award compensation for all of the rights taken from appellants, that portion of the judgment may also be set aside and a revaluation made *in toto*.

Appellants assign as error the failure to render any judgment in favor of appellants for the right, during one year, ten months, and twenty-seven days, to take gravel and gold from their property.

Stripped of unnecessary verbiage, the respondent sought

“the right * * * for * * * two years from the * * * entry of an order * * * granting * * * possession * * * of taking * * * concrete aggregates * * * in * * * the construction of said * * * project, and * * * such other rights * * * as may be incidental * * * free from any right * * * of * * * defendants * * *”

(T. R. pp. 11-12.)

In the exercise of this right respondent proposed to enter upon appellants' property and remove gravel, and, if necessary

“take * * * aggregates without recovery of gold”

(T. R. pp. 9-10.)

This language permits but one interpretation, and that is, if appellants could not save the gold, and the evidence established that they could not (R. T. pp. 223-224), respondent might take such gravel and sand, with gold, as they desired for the construction and maintenance of the dam. By the complaint, and by the order, no limitation was placed on the quantity. Without in any way violating the language of the complaint or the language of the order giving it possession and starting the two year period, respondent could have removed and used every scrap of gravel and gold from appellants' property.

A legal analysis of the right taken,

“The right for two years from the entry of an order granting possession of taking concrete aggregates in the construction of said project and such other rights as may be incidental, free from any right of defendants, and to take aggregates without recovery of gold”

shows that it was what is in law termed a profit à prendre, and that by its terms it commenced to run October 17, 1939, and continued until September 13, 1941. During any of that period had respondent built the proposed dam, it could have exercised that right to its fullest extent. Looked at as a profit à prendre, respondent did not acquire any physical gravel, not one pebble. Instead it acquired an incorporeal right to enter upon the property and take gravel.

The rule of “profit à prendre” which is the right to take something out of the soil of another as a right of common and also some minor rights as a right to fish, hunt, and hawk, or to mine metals, dig for oil or take oil from the land, applies to extraction of gold.

Gold Mining & Water Co. v. Swinnerton,
Cal. App. (2d), 121 P. (2d) 840, 843.

“Profits à prendre” consists of a right to take a part of the soil or product of the land of another in which there is a supposed value.

U. S. v. 1070 Acres of Land, 52 F. Supp. 378,
380.

“Profit à prendre” is defined to be the right of taking soil, gravel, minerals, and the like from the land of another.

Black v. Elkhorn Mining Co., 49 Fed. 549, 551;

Payne v. Sheets, 75 Vt. 335, 55 Atl. 656;

Munsey v. Mills & Garrity, Tex., 283
S. W. 754, 759;

Trimble v. Kentucky River Co., 235 Ky. 301, 31
S. W. (2d) 367;

Santa Rita Co. v. Board of Equalization, 101
 Mont. 268, 54 P. (2d) 117, 127;
Waller v. Dwellee, 187 Iowa 1384, 175 N. W. 957,
 960.

“Profit à prendre” creates interest in realty in nature of covenant running with the land, distinguished from personal obligation of the owner.

Richfield Oil Co. v. Hercules Gas Co., 112 Cal.
 App. 431, 297 Pac. 73, 75.

It carries the right of entry and right to remove from lands designated products, “profits”.

Richfield Oil Co. v. Hercules Gas Co., 112 Cal.
 App. 431, 297 Pac. 73, 75.

The principal feature of a profit à prendre is that it is an interest or estate in the land itself which distinguishes it from a pure “easement” which is a right or interest without profit, there being in case of an easement an absence of all right to participate in the profits of the soil charged therewith.

Richfield Oil Co. v. Hercules Gas Co., 112 Cal.
 App. 431, 297 Pac. 73, 75.

An “easement” and a right to “profit à prendre” each is incorporeal real property, involving possession for use of land, the title and the broader right to possession of which is in another, the distinguishing feature of profit à prendre being the right to take from the land part of the soil or a product of it, and of an easement being the absence of all right to participate in the profits of the soil.

Saratoga Corpn. v. Pratt, 227 N. Y. 429, 125
 N. E. 834, 838.

An oil and gas lease for Oklahoma land containing usual provisions creates in lessee a present interest or estate, which is an incorporeal hereditament, sometimes called a “profit à prendre”.

Francis v. Superior Oil Co., 102 F. (2d) 732, 734.

An oil lease for an indefinite term or for a term of years and as long thereafter as oil or gas may be found in the land, creates in lessee a “profit à prendre in gross”.

Payne v. Callahan, 37 Cal. App. (2d) 503, 99 P. (2d) 1050, 1056;

Dutton v. Interstate Invest. Co., Cal. App. (2d), 113 P. (2d) 492, 494;

Phillips v. Bruce, 41 Cal. App. (2d) 404, 106 P. (2d) 922, 924;

Tanner v. Title Ins. & Trust, 20 Cal. (2d) 814, 129 P. (2d) 383, 386;

Dallapi v. Campbell, 45 Cal. App. (2d) 541, 114 P. (2d) 646, 650;

LaLugana Ranch Co. v. Dodge, 18 Cal. (2d) 132, 114 P. (2d) 351, 353, 354;

United States v. Stanolined Company, 113 F. (2d) 194, 198;

Lever v. Smith, 30 A. C. (2d) 667, 87 P. (2d) 66, 68;

Austin v. Hallmark Oil Co., 21 Cal. (2d) 718, 134 P. (2d) 777, 785;

Romero v. Brewer, 58 Cal. App. (2d) 759, 137 P. (2d) 872, 874;

Richfield Oil Co. v. Hercules Gas Co., 112 Cal. App. 431, 297 Pac. 73, 75;
Dabney-Johnston Corp. v. Walden, 4 Cal. (2d) 637, 52 P. (2d) 237.

While the complaint designates the right taken by the Government as an "easement", it is not, technically, an easement. An easement is a privilege without profit. A right by which one person is entitled to remove and appropriate for his own use any part of the soil belonging to another, or anything growing in or attached to or existing upon the land, for the sake of the benefit to be gained of the property thereby acquired in the thing removed, has always been considered in law a definite species of right distinct from an easement and is commonly called "profit à prendre". A conveyance of land with a mill and dam thereon, granting use of a gravel pit located on other lands of the grantor, for making repairs necessary to the dam, has been held to give the grantee the right to remove the necessary gravel for repairing the dam, being a "profit à prendre", and although in some respects like an easement, technically not an easement.

Walker v. Dwellee, 187 Iowa 1384, 175 N. W. 957, 958.

An examination of the history of the Ruck-a-Chucky Dam shows conclusively that the respondent intended, rather than to buy gravel, rather than to limit the amount of gravel to which it would be entitled to remove, to take the absolute right to remove from

appellants' property an indefinite amount of gravel, even to take and use the entire deposit, if necessary.

Public No. 409—74th Congress, H.R. 6732, approved August 30, 1935, and Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress provided for *a dam*. The location, size, cost, and structural material were not specified. These were details, by the terms of those two enactments, left to the United States War Department Engineers. These were not worked out until May of 1939.

“Q. Who was the engineer in your office who estimated the cost of construction of this dam?

A. All of those estimates were prepared under my direction.

Q. Your supervision?

A. That is correct.

Q. They were made about when?

A. About May, 1939.”

(T. R. p. 96.)

When, after examination, the engineers determined that the site originally selected was no longer usable, the project was not abandoned. Instead, the engineers looked elsewhere for a new site for the same dam that Congress had already authorized in the year 1935.

“A. It was along in May—I forgot the exact date—in May of 1940, that the portal of that exploratory tunnel was uncovered.

Q. Was it afterwards determined by the War Department that it would be necessary to select another site?

A. It was.

Q. And did you figure on selecting a site near there downstream or upstream?

A. At first we explored a site downstream, about a mile downstream from the original site, and we spent some months in diamond-drilling and tunneling in that area * * * further exploratory work was then continued upstream from the site at which the last slide occurred, and four sites in that locality were mapped and preliminary geological explorations made to determine the most feasible locality.

Q. And was a determination made?

A. Yes.

Q. About when?

A. About November, 1940, or December, 1940."

(T. R. pp. 108-109.)

In casting about for a new location, at all times the engineers intended to exercise their *profit à prendre* in appellants' land, had it been convenient for them to do so.

"Q. Mr. Goodall, you considered—your office considered that wherever that dam was built on this river, it was still the same project, did you not?

A. We did.

Q. And it was your intention at all times while you were looking for another site, to use as much of these concrete aggregates as you might see fit to use for the construction of any dam, wherever it might be on this river?

A. That would depend on where the dam was built, and the type of dam finally chosen in an alternate site.

Q. Let me put it this way: that it was your intention, when you looked at and examined the site downstream from the original site, to use this gravel if you built a concrete arch there?

A. That is correct.

Q. And it was your intention, if you selected a site where this gravel is more available than any other gravel, and you required any concrete aggregates, to use this gravel, was it not?

* * * * *

Mr. McMillan. I offer that objection, on the ground it is too speculative and remote.

The Court. The objection is sustained.

* * * * *

Q. Now, those investigations to determine the site were made pursuant to this same Act of Congress authorizing the construction of the Ruck-a-Chucky Dam, were they not?

A. Yes.

Q. Are you able to tell at this time, had the second site been selected, the number of yards of concrete aggregates that would have been required for the construction of that dam?

Mr. McMillan. I object to that, may it please your Honor, on the ground it is purely speculative, too remote, and necessarily this engineer has made no mistake at all with reference to these later sites.

Q. You have made no estimates with reference to that, have you?

A. We made an estimate of the lower site.

Q. But it was never selected, as I understand?

A. No, because it cost too much money."

(T. R. pp. 118-120.)

Appellants assign as error the refusal of the district judge to allow the witness to answer the questions above set forth. It is urged that a truthful answer would have shown that from May, 1940, to December, 1940, the amount of gravel that would have, or might have, been taken, under and pursuant to the profit à prendre taken by condemnation, was uncertain and indefinite.

Instead of permitting appellants to show, fully, the uncertainty of the amount of gravel withdrawable under the profit à prendre so taken and condemned, the district judge permitted respondent to prove, over appellants' objection, that the extent of intended exercise and enjoyment of a profit à prendre so taken and condemned, was definitely limited.

“Q. Was it estimated, the quantity of gravel concrete required in the construction of that dam?

Mr. Cornish. Just a moment.

If the Court please, I object to that on the ground it is incompetent, irrelevant and immaterial. I refer your Honor to the complaint, and in the complaint it sets forth that the Government is condemning the right, for a period of two years, to take gravel from this property for use in the construction, or incidental to the construction of this project. Nowhere in the complaint is the amount of gravel which the Government thought, at the time, it might take, set forth, and in no wise in the complaint does the Government limit itself as to the amount that it would take from the property * * *

(Argument followed.)

The Court. The objection is overruled. Proceed.”

(T. R. pp. 97 and 106.)

To further impress the exact nature of the right so taken and condemned, and to conclusively establish its unlimited character, again appellants refer to the record. Without prolonging this brief by quotation at length, these significant facts appear in the testimony:

FIRST: Respondent approached appellants for the purpose of negotiating a purchase of appellants' gravel. (T. R. pp. 278-279.)

SECOND: Appellants offered to furnish respondent with gravel, to be paid for as delivered, on a royalty basis, thus offering to sell a tangible product of their land, not offering to sell an incorporeal profit à prendre in their land. (T. R. p. 279.)

THIRD: A sale of gravel was not acceptable to respondent. (T. R. p. 279.)

FOURTH: Respondent sought to negotiate a cash price for which it would receive:

(a) A profit à prendre to take gravel and sand from appellants' property;

(b) That said products could be taken from any place over the area of appellants' land, and from any depth;

(c) That the amount to be taken be not limited;

(d) That appellants refrain from mining their land for two years to allow respondent full, complete, unobstructed possession and use

of the land, save only to recover the gold from the gravel as a corollary to the process of removing the gravel and sand.

(T. R. pp. 207-212, 215-222, 226, 227, 280-284.)

The rights taken by respondent are defined in the complaint. As so defined, we have seen, they amount to a profit à prendre, unlimited as to the extent of the privilege of exercise. All of the surrounding circumstances clearly show a deliberate intent that the extent of the respondent's right should be unlimited for its two year duration.

"The Tennessee rule is that the compensation to be paid the owner is to be upon the assumption that the easement will be enjoyed to its fullest extent. That appears to be the Tennessee rule, and it is also the federal rule, except under the federal rule the just compensation to be paid the landowner turns upon the question of the effect the enjoyment of the easement to its fullest extent will have upon the cash market value of the property upon which the easement is imposed. Under either rule, whether the loss to the owner is to be paid for as damages inflicted by the imposition of an easement or by way of just compensation for the thing taken, the result should be the same if the market value of the property before and after the imposition or taking is used as the measure of loss or damage. The question is, how does the easement affect the market price of the property * * *. Specifically if the imposed easements leave the property less marketable because as to some of it the owner of the fee or servient estate cannot use it at all or cannot use

it as effectively or profitably, the Commission will, from the material facts before it, determine the extent to which the inability to use the property upon which the easement is imposed at all or in parts, affects the fair cash market price of the whole. The adverse effect upon the market price, that is, the amount the imposition of the easement has reduced it, will constitute the just compensation due the owner.”

United States v. Indian Creek Marble Company,
D.C.E.D. Tenn., 40 F. Supp. 811, 821.

In the interpretation and definition of the right so taken and condemned, that provision was made as above set forth for the saving of the gold by appellants cannot in any wise narrow the broad and unlimited right taken. Those safeguards were based upon an hypothetical rate of production of 100 cubic yards per hour (T. R. pp. 221-223) and since the respondent saw fit to eliminate any restriction of maximum rate of production of sand and gravel, these “safeguards” were of no value, and did not, and could not, enable appellants to recover the gold. (T. R. pp. 223-224.)

Therefore, for the purpose of placing a value upon this profit à prendre so taken and condemned by respondent, it must be interpreted in its broader significance, as the right to enter upon appellants’ property and rights, mine the entire property, had respondent seen fit to do so, as long as in so doing respondent was producing gravel for the construction and/or maintenance of the Ruck-a-Chucky Dam, and, in addition thereto, had respondent elected, stockpiling all of the

gravel in the appellants' land in that period of two years that it would ever need in the construction or maintenance of the Ruck-a-Chucky Dam, thereby removing and retaining all of the gold, which respondent's witness, Arthur F. Bishop, testified was present and recoverable in quantities at the rate of 34.1¢ per cubic yard (T. R. p. 417), and, on respondent's witness' testimony of quantity present, 535,000 cubic yards (T. R. p. 362), removing, retaining and keeping gold of the value of \$182,435.

**FINDING NO EVIDENCE OF VALUE OF INCORPOREAL
RIGHT NOT SUSTAINABLE.**

The district judge made his finding

“That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself.”

(T. R. p. 87.)

In making this finding, the district judge disregarded the testimony of two of the witnesses called by respondent for the purpose of establishing values.

After testifying that the highest and best value to which the land could be put was dredge mining, and that its reasonable market value for that purpose on October 17, 1939 was \$12,000, Mr. Arthur F. Bishop testified:

“Q. And in your opinion, Mr. Bishop, that property is of no value for anything but mining, is it?

A. That is my opinion.

Q. As a cabin site, as a farm, as a ranch, as a place for pasturing cattle, it would have practically no value?

A. No, sir.

Q. Now, what, in your opinion, Mr. Bishop, would be the reasonable value, the fair market value of the privilege of going onto this property without any interference from anyone, for a period of one year and eleven months, and remove gravel or any other minerals that might be found on the property during that period?

A. Would you repeat that question for me, please?

Q. Mr. Cornish. Read the question, please.

The Court. The reporter will read the question. (Question read by the reporter.)

A. Well, if I would be going on the property I would be going on there with the idea of mining, and on account of the high speculative hazard there I wouldn't give any more than that.

Mr. Cornish. Q. I beg your pardon?

A. I wouldn't give any more than that amount of money.

Q. In your judgment the property could be completely mined in a year and eleven months, couldn't it?

A. Yes.

Q. And from what you found from your test, be mined at a profit?

A. I believe so. That is my opinion.

Q. And from your knowledge of the middle fork of the American River, the gravels on this property are considerably higher in gold content than the gravels on the stream below—or don't you know that?

A. You mean the position of this property as regards the American River, or——

Q. The gravels on this particular bar have a higher gold content than the gravels on the middle fork of the American River to the south and southwest of this property?

A. Well, I don't know about that. I couldn't answer that.

Q. You don't know about that?

A. No, I couldn't answer that question.

Q. But you would feel that from twelve to thirteen thousand dollars would be a fair price to pay for the privilege of taking gravel, or any other minerals, off this property for a period of one year and eleven months?

A. That is my opinion.

Q. And in your opinion the mining of this property, the taking of the minerals from this property, is the highest and best value or use to which the property could be put?"

(T. R. pp. 411-412.)

Similarly, respondent's witness Richard G. Smith, after similarly testifying that on October 17, 1939 the highest and best use to which the land could be put was dredge mining and that for that purpose it had a reasonable market value of \$12,000, testified as follows:

“Q. Now, in your judgment, Mr. Smith, if you owned this property, and someone came to you and said that they wanted the exclusive right, independent of any interference from you, to remove gravel from this bar for a period of one year and eleven months, and to take such other minerals as they may see fit, what in your opinion would be a fair compensation to pay to you as the owner of

that property for that right, given on the 10th of October, 1939, and to extend for a period of one year and eleven months thereafter?

A. \$12,000.

Q. In other words, you feel that in that time that they could take out everything that was in the property?

A. That is right."

(T. R. p. 430.)

By this testimony specifically, and by other testimony running throughout the record, it was established that the appellants' land was valuable for only one purpose, dredge mining, and that it could reasonably and economically be mined out in less than one year and eleven months. Therefore, it logically follows, for the reasons explained by respondent's two witnesses, that the full exercise of the profit à prendre so taken and condemned by respondent was the equivalent of the full enjoyment of the fee itself, and, for that reason, the profit à prendre, so taken and condemned by respondent, had the same value as the fee.

The finding of the District Judge was therefore erroneous.

**THE INCORPOREAL PROPERTY A PRENDRE WAS TAKEN,
AND VESTED OCTOBER 17, 1939.**

This action was brought under the provisions of U. S. Code, Title 33, Section 591. That section, in turn, provides that the proceedings shall be in conformity with the laws of the State in which the action is brought, in this case, the laws of California. In

construing Section 591, Title 33, U. S. Code, it has been held that the state statute prescribing the time that title vests is controlling.

Empie v. United States, 131 F. (2d) 481.

Appellants concede that it is the California rule that title does not vest in the condemnor until the money is paid, and that the money was not paid in this case. There is no doubt but that, had respondent condemned any given amount of gravel, the title to the gravel would not have passed, no compensation having been paid, and that even the entry into possession of the tangible gravel condemned would not have vested the title in respondent.

But appellants earnestly contend that it was not the purpose of Congress, in adopting U. S. Code Title 33, Section 591, that the state law of eminent domain should be controlling over any express enactments of Congress, especially over U. S. Code, Title 33, Section 594, or over the Constitution of the United States of America.

The complaint sets forth:

“That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937.”

(T. R. p. 12.)

The purpose of this allegation was to give the District Court jurisdiction to make an order placing re-

spondent in immediate possession. That order (T. R. pp. 38-40) was made by the District Court pursuant to U. S. Code, Title 33, Section 594, which requires, as a precedent to such an order:

“Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the Court in which such proceedings shall be instituted.”

U. S. Code, Title 33, Section 594.

The complaint did not ask for a general two-year privilege, but asked for a right for a specific period:

*“of two years from and after the time of the granting and entry of an order by this court, granting to the United States of America immediate possession of said land * * *”* (Italics ours.)

(T. R. p. 11.)

As authorized, as defined in the complaint, and as determined by the order of the District Court (T. R. pp. 38-40), this incorporeal profit à prendre, so taken and condemned by respondent was to start October 17, 1939, and on no other date.

The statute authorizing the entry into possession provides in part:

“* * * the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands,

easements, or rights of way, *to the extent of the interest to be acquired*, and proceed with such public works thereon as have been authorized by Congress * * *” (Italics ours.)

U. S. Code, Title 33, Section 594.

To hold that this intangible, incorporeal, profit à prendre, for a two-year period to commence October 17, 1939, did not vest because the purchase price had not been fixed and determined, and paid, would do violence to the express wording and spirit of the federal statute. For how could respondent take possession of an incorporeal right, to start at that instant, to its full extent, and proceed to use it, without that right “vesting” in respondent? To fix any day of vesting of that right other than October 17, 1939 would have deprived the respondent of the privilege of the statute. To that extent, therefore, the federal statute must control.

Under that statute respondent had the right to exercise the incorporeal profit à prendre from October 17, 1939 to September 13, 1941, appellants could not have prevented the enjoyment, during that period, to the fullest extent the right was defined by the complaint. In the humble opinion of appellants, nothing more was necessary to vest that right.

Thus, by paramount public right, here, respondent seizes (1) possession of 40.34 acres of ground, (2) the right for two years to remove gravel and gold therefrom for use in the construction and maintenance of the Ruck-a-Chucky Dam, and (3) the right during

that period to mine that property. These were the particular interests in that land that suited respondent's purpose. This it may do. But in so doing, it must pay just compensation therefor. It must pay what is just for the special type of character of interest which it sees fit to acquire.

It is well settled that the government may acquire for public purposes such property as it may select; it may take such interest in or use of property as it may determine; it may fix the term of use; it may use the property for any purpose. These powers are executive.

Monongahela Navigation Co. v. United States,
148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622;

United States v. New River Collieries, 262 U. S.
341, 67 L. Ed. 1014, 43 S. Ct. 565;

United States v. Meyer (7th Cir.), 113 F. (2d)
387.

The extent and exercise of such powers is not of judicial concern. But what compensation shall be awarded and the rules and standards applicable thereto is solely a judicial function.

Monongahela Navigation Co. v. United States,
148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622.

It is not only the province but the duty of the Court to see to it

“that private property shall not be taken for public purposes without just compensation.”

Constitution, Amendment V.

**DISTRICT JUDGE'S FINDING NO DAMAGE SUFFERED
IS NOT SUSTAINABLE.**

As a further reason for denying to appellants compensation for the taking of this profit à prendre, the District Judge made these additional findings:

“That plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff.
* * *

That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land. * * *

That defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941.”

(T. R. p. 87.)

Appellants admit that on September 13, 1941, respondent filed an abandonment. (T. R. pp. 73-74.) Appellants further concede that by that abandonment, respondent returned to appellants, unused, the last one month and four days of the two-year period for which the profit à prendre was originally taken and condemned. But appellants contend that it had no other or further significance. As we have just pointed out, the profit à prendre so taken and condemned, vested in respondent on October 17, 1939, and re-

mained vested until September 13, 1941. During that period respondent had the right to enjoy it to its fullest extent. By its nature, it was not tangible. By its nature, it was used up and consumed, day by day, until on September 13, 1941, only one month and four days of the right could, by the nature of things, be abandoned back to appellants. The expired and consumed one year, ten months and twenty-seven days of that intangible right and privilege could no more be abandoned back to appellants, than could respondent have condemned a building for destruction, destroyed it and then, after it had been destroyed, abandoned back the ashes.

The District Judge tried the case, and received evidence, and made his findings, on the theory that the abandonment changed the nature of the case, and controverted it into a damage claim, comparable to an action in the Court of Claims for something wrongfully taken, and that the proceeding before him was no longer a condemnation action to fix the reasonable value of the property lawfully taken by respondent from appellant for a public use. Appellants submit, it was not only the province but the duty, of the District Judge to see to it

“that private property shall not be taken for public purposes without just compensation,”

Constitution, Amendment V.

in accordance with the rules laid down by the Courts for the fixing of damages in a condemnation proceeding.

In a condemnation proceeding it is the rule that the owner of private property, taken and condemned for a public use, is entitled to the value of the property taken for public use, and that the value be fixed as of the time of taking.

Olson v. United States, 292 U. S. 246,
L. Ed., S. Ct.;

United States v. Klamath and Modoc Tribes,
304 U. S. 119, 82 L. Ed. 1219, 58 S. Ct. 799;

Danforth v. United States, 308 U. S. 271, 84
L. Ed. 240, 60 S. Ct. 231;

United States v. Miller, 317 U. S. 369, 87 L. Ed.
336, 63 S. Ct. 276.

The case last cited is of particular interest, because there the Supreme Court held that the property was taken when the project was planned, not when the declaration of taking was filed, and refused the property owner a known increase in value between the time of the "taking" and the time of filing of the declaration of taking.

If the land owner is not entitled to appreciation of value after the taking, no more must he suffer from depreciation in value after the taking.

Notwithstanding, over appellants' objection the District Judge admitted evidence, relating to the value of the profit à prendre so taken and condemned, tending to depreciate the value, and to show the extent of enjoyment of the profit à prendre, so taken and condemned, all pertaining to things and events occurring after the taking.

“Q. * * * Now, let me ask you, do you know whether or not any gravel was taken?

Mr. Cornish. Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The Court. The objection is overruled. Proceed.

Mr. McMillan. Q. Whether or not any gravel whatever was taken in the furtherance of this suit in the construction of the Ruck-a-Chucky Dam?

A. There was none.

Q. None whatever?

A. That is right.

Q. * * * Did the plaintiff ever construct the Ruck-a-Chucky Dam?

A. No.”

(T. R. p. 107.)

Based upon the foregoing testimony, the District Judge made the above findings, which appellants insist are prompted by a misconception of the case before him, and should not have been made. Although perhaps proper had this been a suit in the Court of Claims for actual damages suffered, they were not proper in a condemnation suit, nor under the rule laid down in

United States v. Miller, 317 U. S. 369, 87 L. Ed. 336, 63 S. Ct. 276.

It must be remembered that the interest in appellants' land so taken and condemned by respondent, was not a corporeal interest, but an incorporeal profit à prendre; not tangible gravel, but *the right* to take gravel and gold.

In an article entitled “Abandonment of Interests in Land”, in 25 Ill. L. R. 261, the author, James W.

Simonton clearly points out the distinction between an incorporeal right, and the enjoyment or use of that right. The owner may never use nor enjoy the right, yet he cannot thereby lose it. The right continues in existence, and acts on the part of the servient owner which would interfere with the enjoyment or use, if the dominant owner should want to use or enjoy the right, for no matter how long the interference may endure, do not work an abandonment of the right itself. Some affirmative act on the part of the owner is necessary for that result to obtain.

Where a power company flooded land and paid compensation to the surface owner, it was held that the owner of 5/6 of the minerals underneath, never having been compensated for loss of access to his minerals, and although he acquired ownership of the minerals after the land was flooded, was nonetheless entitled to compensation.

“Defendant contends that it has acquired and can acquire no easement from plaintiffs as owners of mineral rights in the land * * *. The easement of defendant to flood the lands is a burden not only upon the rights of the owner of the surface but also upon the incorporeal hereditament of access belonging to the owners of the mineral rights. This easement of the owners of the mineral rights may no more be taken from them or its value be impaired without just compensation than the rights of the owner of the surface may be taken from him * * *. Closely analogous to the rights of the plaintiffs here is the right of one who has an easement of access over a street or alleyway to recover for deprivation of that right.”

Duke Power Co. v. Tones (C. C. A. 4th), 118 F. (2d) 443, 447.

There can be no explanation of the findings of the District Judge except that he was determining loss to appellants caused by the extent of enjoyment of the profit à prendre so taken and condemned, rather than loss to the appellants by reason of the taking, as contradistinguished from the use.

To perhaps more clearly point this out, suppose the case had come before the Court on October 18, 1939, instead of November 16, 1943. Suppose then the District Judge had no idea the rock slide would occur, and no limitation was placed on the extent to which respondent would thereafter enjoy the profit à prendre, so taken and condemned. Could he have justly speculated as to the extent respondent would enjoy the right, and compensated appellants to that limited extent? And had his estimate been low, and the enjoyment thereafter exceeded his estimate, could he have granted appellants additional compensation to make the total compensation "just"?

And, by the same token, had appellants offered their land for sale as a dredge mining project to Mr. Bishop or Mr. Smith for \$12,000 on October 18, 1939, would they have accepted the offer and purchased for that figure? By no means. They would have replied "The United States has the right to take gravel and gold for two years. In that time they can denude the property of gold. They have taken its only value. I am not interested."

Thus, when the District Judge found

"That defendants have suffered no pecuniary loss over and above the use and occupancy * * *"

(T. R. p. 87.)

he completely forgot that defendants were legally injured to the extent of the entire value of their property as dredge mining property for a year and a half. And for this injury he found and gave no compensation.

When a declaration of taking is filed, taking the fee except for road easements, this is broad enough to cover and include an easement of drainage over the land taken, an appurtenance to an adjoining cemetery. An amendment to the declaration of taking cannot revest the easement in the cemetery. And, having taken the easement, the government must pay just compensation to the cemetery for the easement.

United States v. Sunset Cemetery, 132 F. (2d) 163.

So, having taken and condemned from appellants a profit à prendre, respondent cannot, by non-enjoyment, revest the right taken and avoid compensation to appellants.

UNDER RULES FOR DETERMINATION OF VALUE, APPELLANTS WERE ENTITLED TO SUBSTANTIAL COMPENSATION FOR THE PROFIT A PRENDRE TAKEN, APPRAISED AND FIXED AS OF OCTOBER 17, 1939.

Appellants' claims may be thus summarized: On October 17, 1939, they were to all intents and purposes the owners of the fee in a parcel of land. On that date respondent impressed on appellants' land a profit à prendre, in the full exercise of which, without violating any restrictions placed on that right, respondent could have entered upon appellants' land and in the process

of removing gravel, removed gold of an established value of \$182,735 and retained both gravel and gold.

“The just compensation to be paid the land owner turns upon the question of the effect the enjoyment of the easement to its fullest extent will have upon the cash market value of the property upon which the easement is imposed. Under either rule, whether the loss to the owner is to be paid for as damages inflicted by the imposition of an easement or by way of just compensation for the thing taken, the result should be the same if the market value of the property before and after the imposition or taking is used as the measure of loss or damage. The question is, how does the easement affect the market price of the property * * *. Specifically if the imposed easements leave the property less marketable because as to some of it the owner of the fee or servient estate cannot use it at all or cannot use it as effectively or profitably, the Commission will, from the material facts before it, determine the extent to which the inability to use the property upon which the easement is imposed at all or in parts, affects the fair cash market price of the whole. The adverse effect upon the market price, that is, the amount the imposition of the easement has reduced it, will constitute the just compensation due the owner.”

United States v. Indian Creek Marble Company, 40 F. Supp. 811, 821.

That profit à prendre, so taken and condemned by respondent, must be valued as of October 17, 1939, the date of taking.

Olson v. United States, 292 U. S. 246, 78 L. Ed. 1236, 54 S. Ct. 704;

United States v. Klamath and Modoc Tribes,
 304 U. S. 119, 82 L. Ed. 1219, 58 S. Ct. 799;
Danforth v. United States, 308 U. S. 271, 84
 L. Ed. 240, 60 S. Ct. 231;
United States v. Miller, 317 U. S. 369, 87 L. Ed.
 336, 63 S. Ct. 276.

The test of value of a profit à prendre is not the value of the fee itself. It is the value of the right taken, which, of course, cannot exceed the value of the fee. This can be reached by determining what, if anything, is left to the landowner. Thus, when land has no value except for surface rights, the taking of an easement to pass over amounts to a taking of the fee, and is valued the same. And if the taking of a profit à prendre, as respondent has so taken and condemned here, amounts to the power and privilege of extracting the full value of the fee, there is no reason why it should not be so valued.

“After all, the intent of the Fifth Amendment to the Constitution is that while the government has power, with practically no limitation, to take property, nevertheless, the owner is to be treated fairly and his rights maintained. It is the duty of a court to attempt as nearly as possible to put the owner in as good a place as he was before the taking. In my opinion he is entitled to receive a definite fixed payment representing the value of this property at the time of the taking. If this taking be of a fee simple title the rules under which to ascertain the compensation are well fixed and known. See particularly *United States v. Miller*, *supra*. On the other hand, if the estate is anything less, then it is a question of fact for the jury to

give due consideration to what, if anything, is left to the landowner, and when it has found the value of that it should be deducted from the full value of the fee simple title. This to me more nearly approaches a definition of just compensation and fair dealing with an owner than any other suggestions that have been made.

It may be suggested that the government should not be put to the jeopardy and risk of a finding which might be in part speculative because of the uncertainty of all the conditions surrounding the taking of the property. The same argument applies with equal force to the owner. And since it is the government which has determined the estate in and manner of taking, if either party is to run the risk of a loss because of changes in the future, it would seem to be just that this be assumed by the party who is in control of and has determined the status of the case."

United States v. 9.94 Acres, 51 F. Supp. 478, 485.

Compensation must be awarded in the action immediately. The trial Court has no right to postpone the determination of the case in order to determine what, if any, actual loss may be suffered by the land owner.

"I cannot believe that the constitutional guarantee that no man's property could be taken without just compensation has any such meaning and that the owners of the property may be forced into receiving annual stipends. Just compensation in my opinion means exactly what it says, and it means that the owner himself is entitled to receive his compensation; not that his estate or his

children or his grandchildren are to receive installment payments and perhaps inherit a law suit in the far future.”

United States v. 9.94 Acres, 51 F. Supp. 478, 483, 484.

“It is contended that no present detriment warrants present assessment of damages, inasmuch as the government is obligated to eventually return the property, subject to wear and tear, in its condition at the time of taking.

But by taking this special or particular type or interest in defendant’s hotel property, the government cannot defer payment for the damage, or interest taken, to a later period. Nor can it force defendant, if it chooses, to again litigate its right to compensation in another forum.

Compensation should be determined by the jury in this proceeding. It has been frequently held that the compensation for the taking of property must be awarded in the condemnation proceeding itself. In *East Bay Municipal Utility District v. Lodi*, 120 Cal. App. 740, at page 762, the Court said: ‘The law seems to be quite uniform that in eminent domain proceedings the damages must be assessed once and for all, and must include all the damages that might be inflicted by the condemning party.’ *Id. Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737.

The government says it is obligated to and will return the hotel to the defendant in the same condition as received, wear and tear excepted, when it finally determines to end the lease. But ‘just compensation’ does not mean a promise, however well intentioned, to perform an act in the future. The owners of the hotel are entitled to

compensation for the taking, not their heirs in years to come, and then mayhap, after litigation in the Court of Claims, if there be one at the time. What would really happen if this theory were adopted would be, as stated by Judge Waring in *U.S. v. 9.94 acres, supra*, that condemnation cases would be tried piecemeal—a part of the compensation awarded now and a part years hence and then maybe only after new litigation.

It is claimed by plaintiff that evaluation of the damage or loss suffered by defendant due to the use to which the property is being put, and for which it was taken, is too speculative. The government, however, has determined the nature of the estate or interest taken and it likewise will determine the length of tenure. Therefore it is just that, if there be any uncertainty arising as to the amount of compensation, it cannot be advantaged by the plaintiff. Furthermore, mere difficulty in assessing damages where the right to compensation is present, cannot be urged as a ground for denying compensation. 'Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 379. See also *Palmer v. Connecticut Ry. Co.*, 311 U.S. 544, 560. It may well be that defendant will fare better to await a later day for the determination of its damage. Be that as it may, defendant demands that its compensation be fixed in this proceeding and I hold that it is so entitled."

United States v. 60,000 Square Feet, 53 F. Supp. 767, 770, 771.

Similarly when the United States condemned a lease under which lessee was required to restore the premises to the condition when the lease commenced, two years earlier, and thereby relieved the lessee of that obligation, it was held that the loss of that right to lessor required compensation to be paid at once.

United States v. Certain Parcels, 55 F. Supp. 257.

Where the United States took a lease for two years with an option for renewal for duration and one year, it was held to be an estate for years with perpetual renewal, or substantially the fee, and, since compensation was paid only for the two year lease, and not the privilege of renewal, Court struck declaration of taking from file and denied filing amended complaint, because original taking was until June 30, 1945, terminable earlier on 60 days' notice.

“In the first place, just compensation for the acquisition of land taken without the consent of the landowners under eminent domain, requires payment by the sovereign of the full value of the entire interest appropriated. Second, in order to be just, compensation must be paid in full in the immediate condemnation suit * * *. Third, judgment in a condemnation case must confirm the passing of title to the United States and place the title to the compensation for the full interest taken in the landowner and thus, if the right of perpetual renewal is not paid for, the United States would not acquire that right, even if such a clause were inserted in the judgment.”

United States v. Bauman, 56 F. Supp. 109, 114.

Where the taking consisted in flying low over land in the enjoyment of an airport which the United States had leased for a fixed period with an option to renew for a period as long as 25 years, and by reason thereof the landowner was unable to use his land as a chicken ranch, the purpose for which it was peculiarly adaptable, the Court refused to assess damages on the theory that the use was temporary, but assessed as if the taking continued for the maximum period.

Causby v. United States, 60 F. Supp. 751.

CONCLUSION.

Appellants owned land peculiarly adaptable to dredge mining and to no other use. From October 17, 1939 to September 13, 1941 respondent took and held a profit à prendre in that land, in the exercise of which respondent had the power and the privilege of taking everything of value and rendering appellants' land of no further use or value. For that period the interest in that land remaining in appellants was of no value.

Appellants are entitled to compensation for that right taken, to the value of that right at the time it was taken, and respondent cannot avoid payment with the answer that while it took and condemned the right, it never exercised it. Had compensation been fixed October 17, 1939, under the evidence appellants would have been entitled to \$12,000. Their rights can be no less because the trial to fix and determine that

compensation was delayed until November 16, 1943, four years later.

The errors of the District Judge should therefore be corrected, and compensation paid accordingly.

Dated, Berkeley, California

December 14, 1945.

Respectfully submitted,

FRANCIS T. CORNISH,

Attorney for Appellants.

No. 11142

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**F. M. O'CONNOR, STELLA M. O'CONNOR, W. H.
MORRISON, AND R. J. MIEDEL, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION**

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,
*Acting Head, Lands Division,
Department of Justice.*

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11142

F. M. O'CONNOR, STELLA M. O'CONNOR, W. H.
MORRISON, AND R. J. MIEDEL, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court is found at pages 77-82 of the Record.

JURISDICTION

This is an appeal from a judgment in a condemnation proceeding entered August 24, 1944 (R. 83-89). Notice of appeal was filed November 22, 1944 (R. 90).

The jurisdiction of the district court rests upon the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257. The jurisdiction of this Court rests upon section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

The United States instituted proceedings to condemn the right of possession of certain property, together with the right to remove gravel therefrom, for a period of two years, for the construction of a dam. The gravel was gold bearing and provision was made in the complaint for recovery of the gold by the owners from the gravel to be removed by the Government. Under a court order, the United States took possession of the property but removed no gravel. One year and eleven months after taking possession, it filed notice of abandonment of the proceeding. The question presented is whether the United States must pay for all the gravel, including its gold content, which it is alleged might have been removed under the interest described as sought in the condemnation complaint or whether it need pay only for the loss actually suffered by the owners in being deprived of possession for one year and eleven months.

STATEMENT

On October 10, 1939, the United States, at the request of the Secretary of War, instituted proceedings to condemn the right to remove gravel (concrete aggregates) from certain land in Placer and El Dorado Counties, California, for use in the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River which was authorized by the Act of August 30, 1935, 49 Stat. 1028, 1038, to prevent the flow of debris from hydraulic mining and natural erosion on the Middle Fork of the American from obstructing and interfering with navigation on

the Sacramento River and its tributaries (R. 2-37). An order granting immediate possession to the United States was entered on the same day under authority of Section 5 of the River and Harbor Act of July 18, 1918, 40 Stat. 911, c. 155, 33 U. S. C. sec. 594 (R. 38-40, 13-14).

The land described in the complaint consisted of 40.34 acres of land containing a deposit of gold-bearing gravel and was the subject of a mineral location claim filed August 28, 1934, by F. M. O'Connor, Stella M. O'Connor, D. A. Crone, and F. A. Crone (R. 64). It was leased by them on October 31, 1934, to R. J. Miedel and associates for a period of 5 years or until the mine (which was a placer mine) was fully worked (R. 64-68). The requirements of the lease were suspended pending litigation involving the claim (R. 70, 72-73, see R. 131). The lessees, R. J. Miedel and associates, acquired the interest of D. A. Crone and F. A. Crone in the property and it was agreed that a patent should be applied for in the name of the O'Connors as owners of a half interest and R. J. Miedel as owner of the remaining one-half interest (R. 71-72). The requirements of the lease were again suspended until 30 days after final determination of the Government on the patent application or 30 days after final determination of the litigation, whichever was later (R. 72-73). On May 4, 1939, an amended lease for an additional 5 years was executed by the O'Connors as lessors and Miedel as lessee, which recited that mining had been impractical for more than 4 years because of the pending litigation and the pending patent application, that the United States

had indicated its intention to condemn the right to remove gravel unless satisfactory negotiations were concluded and that said condemnation would preclude mining for a further period not exceeding 3 years (R. 58-59). Mining was permitted at once and required not later than 90 days after issuance of the patent (R. 60). By the terms of the lease, the lessee was not to be excluded during the Government's possession, but working requirements were to be suspended for such period and the lease extended *pro tanto* (R. 60). The patent was issued August 28, 1940 (R. 277; see R. 150). The appellants here are the O'Connors, owners of an undivided one-half of the property, R. J. Miedel, owner of the remaining one-half and lessee of the mining rights, and W. H. Morrison who was one of the associates under the original mining lease (see R. 64-68). The latter's interest in the property was assigned to Miedel prior to the patent application (R. 191) and his present interest in the property does not appear in the Record (cf. R. 227-229).

The estate or interest which the United States sought to take was the right, power, and privilege of uninterrupted use and occupancy of the land for a period of 2 years from and after the entry by the district court of an order of immediate possession for the purpose of and with the right, power, and privilege during those two years to remove concrete aggregates in such quantity and in such manner as might be found by the United States to be expedient, necessary and proper in constructing the Ruck-a-Chucky Dam and Reservoir project, provided that in the

process of removing the concrete aggregates provision would be made for the recovery by the owners of the gold contents of such materials in a manner specifically set out in the complaint (R. 11-12, 7-9, 28-32). The provisions for recovery of gold were that the sand and gravel plant to be constructed by the United States would be so constructed as to permit the owners to install gold recovery devices having specified vertical drops, that the United States would deliver the material excavated in certain separate sizes, furnish water and electric power for the gold recovery devices and that the owners would return the materials after removal of gold to the United States (R. 7-9, 28-32). The petition further provided that if the owners failed or refused to remove the gold in accordance with the specifications, the United States should have the option either to take the concrete aggregates without recovery of gold or to remove the gold as specified (R. 9-10), but the judgment prayed for did not include the latter alternatives (see R. 28-34).

On March 25, 1941, the landowners answered the complaint, alleging among other things that the United States had abandoned its plans for the construction of the dam and that it was seeking to take their lands for another and different dam from that authorized by the Act of August 30, 1935, 49 Stat. 1028, 1038 (cf. R. 4) and described in the complaint (R. 41-43, 48). The owners also alleged that the provisions set forth in the complaint for the recovery of the gold content of the material to be taken were inadequate and prejudicial to them in that no rate of extraction of material was specified, making it impossible to know whether the amount of water and

electricity to be furnished would be adequate or whether the gold recovery device with the vertical drops specified would be adequate (R. 43-45). Damages were alleged on the basis of a taking of the gold (R. 49), on the basis of interest on the amount of profits which it was alleged could have been made by mining the property during the two-year period sought by the United States (R. 50) and on the basis of the value per cubic yard of the sand and gravel which might be removed, the quantity being at the time unknown (R. 50). Judgment was sought fixing the amount of damages found to have been sustained and denying the United States the right to take any part of the property described in the complaint (R. 56-57).

On September 13, 1941, the United States filed notice of abandonment of the condemnation proceeding and moved to dismiss the proceeding on the ground that the acquisition of an interest in the land was not necessary or to the best interests of the United States (R. 73-75). The motion for dismissal was denied and the case set for hearing (R. 76). A jury trial having been waived, the case was heard by the district court sitting without a jury (R. 94).

It appeared at the trial that although the United States had obtained an order granting it immediate possession of the estate sought to be condemned (R. 38-40), no gravel, or at the most only 2 truck-loads was ever taken from the property. Counsel for the owners said in his opening statement that there was "no doubt that no gravel was ever taken by the Government" (R. 137). A civil engineer from the

United States Engineer's Office testified that none was ever taken (R. 107). W. H. Morrison, one of the appellants, testified he saw two truckloads of gravel leave the property but it was not clear that they were actually taken from it (R. 256, 270-272). The only acts of possession were the cutting of a path and erection of a power line by the Government contractor prior to the institution of the condemnation proceedings (R. 258-259), stacking some lumber on the property, storing some powder kegs, and putting a lock on the gate to which Mr. Morrison, one of the appellants, and one of the contractor's foremen had keys (R. 197-206). No effort was made to show that the gravel was of any value except for its gold content. In fact, it is conceded that there was no market for the gravel and that the only value which the property had was for gold mining (cf. R. 269-270, 411; Br. 6). However, it was contended that even though the condemnation petition contained provisions to enable the owners to recover the gold content, such provisions were inadequate and that, therefore, the rights which the United States sought to condemn included the right to take the gold (R. 135-137). It was further contended that even though the United States had done no more than take possession of the property and had never removed any gravel, it must pay for the right to remove all the gravel in the property, including its gold content (R. 137-143).

To support their contention that the interest sought necessarily included the right to take the gold as well as the gravel, appellant Morrison testified that the

gold recovery device specified in the complaint in condemnation, operating with the 2,100 gallons of water per minute and electrical energy of 20 horsepower to be furnished by the United States, could not handle gravel in excess of 100 cubic yards per hour; and that while it was understood at the negotiations prior to the institution of the condemnation proceeding that the Government contractor removing the gravel would be limited to 100 cubic yards per minute, it was later learned after the suit was filed that the contractor insisted he was going to use a gravel plant with a capacity of 250 cubic yards per minute (R. 222-225). However, no plant was ever set up (R. 225).

Much testimony concerning the negotiations which preceded the condemnation proceeding was introduced, apparently to show that the United States intended, by seeking the interest described in the complaint, to take an unlimited amount of gravel and that this would include all of the gold (cf. R. 207-212, 215-225, 278-284; Br. 8, 27). This testimony may be summarized as follows: On direct examination Morrison testified that throughout the negotiations the Government representatives refused to agree to limit the amount or places from which gravel would be removed (R. 207-212). He also testified that the specifications in the complaint for the gold recovery device to be used by the owners differed from the one discussed previously in that the complaint provided for a 20-foot vertical drop for the finer gravel and an 8-foot drop for the larger gravel whereas in the discussions, a 20-foot drop was specified for the coarser gravel and an 8-foot drop for the finer (R.

216-219). He did not state the significance of this deviation, but on cross-examination he admitted that it may have been a typographical error (R. 236). On cross-examination he also stated that 70,000 to 100,000 cubic yards was discussed as the quantity needed for the construction of the dam, but that it was indefinite (R. 226). Miedel, who owns a half interest in the property and is the mineral lessee, testifying at length concerning the negotiations (R. 278-284), stated that the Government would not agree to limit the quantity of gravel to be taken (R. 280, 283-284). Upon the Government's objection that it was cumulative and irrelevant to a determination of what was actually taken, or even what was sought in the complaint, testimony by Mr. Cornish, counsel for the owners, as were letters written by the parties during the negotiations, was excluded (R. 337-357).

In addition, appellant Morrison testified on direct examination as to tests of the gold content of the property (R. 179-190). On cross-examination he stated that the property contained 1,300,000 cubic yards of gravel (R. 242). Another witness, Mead, testified to a particular type of suction dredge which he stated, over the Government's objections to his qualifications, could be operated to remove the gold from appellants' property (R. 301-319) and that it would cost about \$22,000 (R. 319). A qualified mining engineer, Wiltsee, testified for appellants that the property could best be mined by a dragline plant and that the cost per yard of dredging would be about 12 cents a yard (R. 322-323, 328-329). Wiltsee also testified to tests he had made of the gold content

of the sand (R. 323-325). On cross-examination, he testified that he thought appellants' property would produce 25 to 35 cents per cubic yard, that it contained 600,000 cubic yards of workable gravel and would dredge about \$200,000 (R. 336-337).

On behalf of the United States, Goodall, the engineer in charge of estimating the cost of construction of the dam, stated that in May, 1935, it had been estimated that 75,000 cubic yards of concrete aggregates would be necessary (R. 106), but that a rock slide at the site of the dam had led to its abandonment and that no gravel had ever been removed from appellants' property (R. 107-111).

Fraser, another Government engineer, testified that appellants' land contained 527,000 cubic yards of workable gravel (R. 366). Another Government witness, Bishop, who was in the contracting and mining business (R. 367-368, 381-382) testified that the highest and most profitable use to which the property could be put was dredge mining and that the fee value of the property, including the gold, and based upon 600,000 cubic yards of workable gravel was between \$12,000 and \$13,000 (R. 371-372, 379-383). He also testified that the right of use and occupation of the property without the right to mine or use it would have no rental value, but that interest at a reasonable rate on the value of the property would measure its value (R. 385-386).¹ This witness also testified to gold tests

¹ In objecting to testimony as to the value of the mere right of possession, counsel for appellants conceded that it was worth no more than one dollar—"in fact, I will stipulate it has no value without the right to take minerals" (R. 384-385).

made under his supervision (R. 387-394). On cross-examination, he stated that the property could be completely mined in one year and eleven months, that the value of the right to remove gravel and minerals for that time would be the same as the fee value \$12,000 to \$13,000, and that the average value per cubic yard as shown by his tests was 34.1 cents (R. 411-412, 417). Smith, who was engaged in the mining business and whose qualifications were conceded by counsel for the owners (R. 417-421), testified that the highest and best use of the property was mining and that its value for that purpose was \$12,000 (R. 425-426). He also stated that the full value could be removed in two years, but that compensation for the mere right of occupation and possession for one year, eleven months would be a reasonable rate of interest—between 4 and 7% (R. 426-427). On cross-examination he testified that the right to remove gravel and minerals for one year and eleven months would be \$12,000 (R. 430).

On March 6, 1944, the trial court filed its opinion (R. 77-82) holding that the owners were not entitled to recover the full value of the right to remove all of the sand, gravel, and gold and that no diminution in the market value of the land had been shown as a result of any acts committed by the United States. He further held that they were entitled to recover for the taking of possession by the United States for the period of its occupancy. Pointing out that there was no evidence of rental value, but that there was sufficient evidence upon which to base an award of compensation having reasonable relation to the detri-

ment suffered by the owners by reason of the Government's use and occupation of the property, the court stated that interest at the prevailing commercial rate on the highest fee value testified to (\$13,000) would afford just compensation for the actual loss sustained. On August 24, 1944, the court made the following findings of fact and conclusions of law, among others: that the land was returned to the owners in the same condition as when entered upon by the United States (R. 87); that the United States took no gravel, sand or other material from the land between October 17, 1932, and September 13, 1941, and exercised no other rights than to use and occupy and that there was no consequent diminution in the value of the land (R. 87); that the owners have suffered no pecuniary loss over and above use and occupancy (R. 87); and that \$1,745 with interest at 7% from October 17, 1939, until paid was full, adequate and just compensation for the interest taken (R. 88).² Judgment was entered accordingly (R. 89). This appeal followed (R. 90).

ARGUMENT

I

Appellants were not entitled to recover a substantial award for the alleged taking of the right to remove gravel and gold which was never exercised

Appellants make no complaint of the determination that \$1,745.00 plus interest represented just com-

² This sum is approximately interest at 7% on \$13,000 for the one year and eleven months during which the United States had possession.

compensation for occupancy by the Government of the land for one year and eleven months (Br. 17, 41). Their appeal is based solely on the claim that substantial compensation should be awarded for the alleged taking of the right to remove gravel and gold. Moreover, appellants admit that they have not actually suffered monetary loss (Br. 2-3). Their contention is that nevertheless they are entitled to the value of a profit a prendre alleged to have been taken, which, they claim, was equal to the value of the fee simple (Br. 33, 51-52). We submit that the court below was clearly correct in rejecting this claim for several reasons.

A. Under the Constitution, appellants are not entitled to recover a substantial award for a merely theoretical taking.—In *Marion &c. Railway v. United States*, 270 U. S. 280 (1926), the Supreme Court made it perfectly clear that when the United States sets out to acquire private property for public use but never exercises the rights originally sought, the owner is entitled to recover compensation only for what he has actually been deprived of. In that case, the President had, as authorized by statute, issued a proclamation taking possession and assuming control of all railroads. The Marion Railway brought suit to recover compensation for alleged use and occupancy from the date of the proclamation until the date the alleged control expired. The United States contended that the President had not taken actual possession of the railroad, had not operated it, or otherwise exercised control. The Supreme Court affirmed a judgment for the United States, saying at page 282:

We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss.

Appellants concede that the action of the district court would have been correct "had this been a suit in the Court of Claims for actual damages suffered" (Br. 2-3, 39, 41). They assert, however, that a different rule is applicable in condemnation proceedings and presumably they would say that the *Marion Railway* case is inapplicable because it was instituted in the Court of Claims. This alleged distinction between suits in the Court of Claims and condemnation proceedings lacks merit.

Whether the remedy be under the Tucker Act, in condemnation proceedings or under special statute, the landowner is asserting the right to recover the just compensation which is guaranteed to him by the Fifth Amendment. While Congress can enlarge the landowners' rights, it cannot limit them more narrowly than the Constitution provides. *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893). In this condemnation proceeding no statute has enlarged appellants' rights and their claim for compensation arises out of the Fifth Amendment (cf. Br. 37, 39). In *Jacobs v. United States*, 290 U. S. 13, 16 (1933), a suit brought in a federal district court under the Tucker Act, the court said:

* * * The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. * * *

And in *Hurley v. Kincaid*, 285 U. S. 95 (1932) the court said (p. 104):

* * * If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 658; *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581, 600; *Tempel v. United States*, 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co. v. United States*, 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires.

Thus, in the Court of Claims the standard of compensation set forth in the Fifth Amendment is controlling to the same extent as it governs condemnation proceedings. The *Marion Railway* case cannot, therefore, be distinguished here.

As we have pointed out, *supra*, pp. 12-13, the judgment below represents adequate compensation for the actual loss that has been suffered by appellants. The court said in *Bauman v. Ross*, 167 U. S. 548, 574 (1897):

* * * The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

See also *Roberts v. New York City*, 295 U. S. 264, 282 (1935); *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195 (1910); *United States v. Miller*, 317 U. S. 369, 375 (1943). We submit, therefore, that to award appellants any substantial sum for the technical taking of the so-called profit a prendre would be "unjust to the public."

B. *After abandonment by the Government the court below lacked jurisdiction to award compensation for the alleged taking of a profit a prendre.*—When private property is sought to be acquired under the power of eminent domain, unless it is acquired under specific statutory proceedings providing otherwise,³ the title does not pass until compensation is actually paid to the owner. "Within the meaning of

³ For example, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, c. 307, 40 U. S. C. sec. 258a, provides that upon the filing of a declaration of taking and the deposit in court of estimated compensation "title * * * shall vest in the United States * * * and the right to just compensation for the same shall vest in the persons entitled thereto."

the Constitution, the property, although entered upon, * * *, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.” *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 659 (1890). As the Supreme Court said in a more recent case, *Hanson Co. v. United States*, 261 U. S. 581 (1923) at p. 587:

The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation.⁴

In *Danforth v. United States*, 308 U. S. 271 (1939) the court explained the nature of condemnation proceedings as follows (p. 284):

* * * The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign

⁴ Appellants refer (Br. 34) to *Empie v. United States*, 131 F. 2d 481 (C. C. A. 4, 1942) where the court stated that the conformity provision of the condemnation acts made applicable state law as to when title passes. That case involved a contest as to who should receive the award upon distribution. Since the interests of the United States were not involved, it did not appear upon the appeal. We submit that when, as in the instant case, the interests of the Government are involved the question is one of substance, not procedure, and local rules are irrelevant. *United States v. Miller*, 317 U. S. 369, 379-380 (1943); *United States v. Johns*, 146 F. 2d 92 (C. C. A. 9, 1944); *Kanakanui v. United States*, 244 Fed. 923 (C. C. A. 9, 1917). Similarly, local rules forbidding the taking of possession prior to payment are irrelevant because, under the Federal Constitution, possession can be taken in advance of payment. *Garrow v. United States*, 131 F. 2d 724, 726 (C. C. A. 5, 1942), certiorari denied 318 U. S. 765; *Hurley v. Kincaid*, 285 U. S. 95, 104 (1932); *Yearsley v. Ross Constr. Co.*, 309 U. S. 18, 21-22 (1940).

power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. * * *

Thus, even when possession of the property has been taken under court order in the course of a condemnation proceeding the United States may still abandon the proceedings to acquire the interest sought. *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 659-660 (1890); *Commercial Station Post Office v. United States*, 48 F. 2d 183, 185-186 (C. C. A. 8, 1931); *Mason City and Ft. Dodge R. Co. v. Boynton*, 158 Fed. 599 (C. C. A. 8, 1907). In such event, it is not liable for the estate or interest which it sought to acquire under its complaint in condemnation. *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 659-660 (1890); *Moody v. Wickard*, 136 F. 2d 801 (App. D. C. 1943), certiorari denied 320 U. S. 775; *Commercial Station Post Office v. United States*, 48 F. 2d 183, 185-186 (C. C. A. 8, 1931); see *Suncrest Lumber Co. v. North Carolina Park Commission*, 30 F. 2d 121, 127-128 (W. D. N. C. 1929) (three-judge court); *Bank of Edenton v. United States*, 152 F. 2d 251, 254 (C. C. A. 4); *Howard v. Illinois Cent. R. Co.*, 64 F. 2d 267 (C. C. A. 7, 1933). As was held in *Moody v. Wickard*, *supra*, the trial court had no jurisdiction to award compensation for the interest sought in the petition after the United States filed its notice of abandonment.

Consequently, the fact that Section 5 of the River

and Harbor Act of July 18, 1918, c. 155, 40 Stat. 911, 33 U. S. C. sec. 594, authorized the United States to take possession of the property pending the condemnation proceeding did not, as appellants contend (Br. 33-37), create a vested right in the owners to compensation for the interest described in the complaint. *United States v. 10.08 Acres of Land, Etc.*, 46 F. Supp. 138 (M. D. Pa. 1942); cf. *Scribner v. Wikstrom*, 34 A. 2d 658 (N. H. 1943). In *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641 (1890), the statute involved provided that the Railway Company, the condemnor, might take possession pending a trial *de novo*, as to value by paying into court twice the amount of a referee's appraisal. The Supreme Court stated the effect of the entry into possession to be as follows (135 U. S. 641, 660) :

But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the statute. So that, if the result of that trial should be a judgment in [the land-owner's] favor in excess of the amount paid into court, the defendant [the condemnor] must pay off the judgment before it can acquire the title to the property entered upon, and failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor.

The rule referred to by appellants (Br. 40, 45-46)

that value is determined at the date of taking does not, as appellants seem to argue, mean that the Government by taking possession is bound to pay for the interest sought to be condemned and cannot thereafter abandon. The problem of the result of abandonment was not involved in any of those cases. In the cases cited the court simply referred to "date of taking" for the purpose of fixing the date of valuation and the date from which compensation for delay in payment, which is ordinarily measured by interest, was payable.⁵ The decision did not, we submit, disagree with or overrule the principles that title does not pass until payment and that until title passes the proceeding may be abandoned (*supra*, pp. 16-20).⁶

⁵ For example, when possession is taken and thereafter a declaration of taking is filed, value is determined as of the date of taking possession even though the United States is not irrevocably committed and may abandon the taking up to the time the deposit is made under the declaration of taking. *Bank of Edenton v. United States*, 152 F. 2d 251, 254; *11,000 Acres of Land v. United States*, decided December 21, 1945 (C. C. A. 5). (Copies of the latter opinion, not yet reported, is submitted herewith). When possession is not earlier taken, value is determined as of the date title vests under the Declaration of Taking Act (*United States v. 576.734 Acres of Land, Etc.*, 143 F. 2d 408 (C. C. A. 3, 1944), and if possession is not taken and no declaration of taking is used, value is determined as of the date of trial. *Carlock v. United States*, 53 F. 2d 926, 928 (App. D. C. 1931); *United States v. Crary*, 2 F. Supp. 870, 878-879 (W. D. Va. 1932).

⁶ It should be noted that appellants are mistaken in interpreting *United States v. Miller*, 317 U. S. 369 (1943), to hold that "the property was taken when the project was planned" (Br. 40). The court simply held that in determining value at the date of taking, the element of enhancement in value due to the project should be excluded from consideration and it is clear from the opinion that the date of taking was the date of filing the declaration of taking and deposit of estimated compensation.

Thus, when the United States filed notice of abandonment (R. 73-74), the court lost jurisdiction to award compensation for the profit a prendre which, appellants claim, was sought in the petition. The only liability of the Government after abandonment was for the one year and eleven months' occupancy of the property. See cases cited, *supra*, p. 18. Appellants admit that the \$1,745 plus interest awarded by the court represents just compensation for such temporary occupancy and the United States has not challenged this award by cross-appeal.

C. *In any event, appellants have been awarded compensation for all rights which the Government sought to condemn.*—As we have shown, appellants do not complain of the award of \$1,745 as compensation for the temporary occupancy by the Government. Their claim is the Government sought a “profit a prendre” to take gravel and gold from the property (Br. 18-19). It may be assumed that the rights thus described are properly designated by appellants as an “incorporeal profit a prendre.” Although the right of “uninterrupted use and occupancy” (R. 11-12) described would seem to be a separate and distinct right, broader than the mere right of entry for the purpose of removing the gravel, which is a part of a “profit a prendre,”⁷ it is not believed that the Government's lia-

⁷ “A profit a prendre confers two rights: A license which authorizes the licensee to enter upon the lands of the licensor, and a grant to the licensee of the things which he is permitted to carry away from those lands.” *Forsyth v. Nathanson*, 139 Ore. 632, 11 P. 2d 1065 (1932). “The underlying principle of the right is that it carries the right of entry and the right to remove and take from the land the designated product or ‘profit’”. *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 Pac. 73 (1931).

bility turns upon any technical distinction as to the exact nature of the estate or interest sought and that a precise definition is unnecessary.

Prior to the institution of these proceedings negotiations were entered into between Government representatives and appellants. At that time a method by which the Government could use the gravel and yet appellants' rights to the gold be preserved was thoroughly discussed (R. 207-212, 215-225, 278-284). At the conclusion thereof appellants "shook hands" with the Government representatives on the arrangement (Br. 8, R. 280-282) and the specifications for removing the gravel which had been discussed in the negotiations were included in the bids published and in the contract between the Government and the contractor who was to build the dam (R. 215, 283).

When the Government filed its petition in condemnation on October 10, 1939 (R. 37), it did not seek simply a right for two years to remove the gravel which contained the gold. On the contrary, lengthy provision was made for safeguarding appellants' rights to the gold during the removal of the gravel (R. 6-10, 29-32). Appellants did not file an answer until March 25, 1941, one year and five months later (R. 57). This answer alleged that the detailed specifications for recovery of the gold were inadequate because no rate of extraction was specified (R. 43-45). In their brief in this Court, appellants assert that because of the absence of a limitation on the rate of production it was impossible for appellants to meet the conditions (R. 13). The only basis for this claim is the testimony of the landowners' witness Morrison. He testified

that when the matter of recovery of the gold by appellants from the gravel to be taken out by the United States was discussed prior to the institution of the condemnation proceedings he had asked how much material would be handled per hour and was told 100 cubic yards per hour (R. 221). Upon that basis the amount of water and electricity to be furnished by the United States was discussed and it was agreed that 2,100 gallons of water per minute and sufficient electrical energy to develop twenty horsepower would be sufficient to operate their gold recovery plant (R. 221). Stating that if the United States had removed and delivered gravel to them at a rate in excess of 100 cubic yards per minute the plant contemplated would not have been able to handle it, Morrison testified that it was learned after the condemnation proceeding was instituted (see R. 224-225) that the Government contractor already had a gravel plant with a capacity of 250 yards per hour which he insisted he was going to use (R. 223-224). It was admitted that no such plant was ever set up (R. 225) and there was no testimony that a gravel plant with a *capacity* of 250 cubic yards per hour could not be operated so as to comply with the provision in the complaint that the United States would construct its sand and gravel plant so as to permit the installation of specified gold recovery devices (cf. R. 7-9, 12, 30-32). It appears from the voluminous testimony introduced by appellants concerning the prior negotiations (see R. 207-212, 215-225, 278-284) that the method set out in the complaint for recovery of the gold by them at the time gravel

was removed by the United States was substantially the same as the method discussed in the negotiations (see R. 215-225). Consequently, the testimony does not warrant appellants' assertion that the "safeguards" set out in the complaint for the removal of the gold were of no value and could not have enabled them to recover the gold.⁸

Thus, it is clear that the Government did not intend to take the gold and that if the project had been carried out no gold would have been taken by the United States. Appellants rely upon the fact that

⁸ While no such question was raised by the answer (cf. R. 44-45) it was said at the trial that there was one variation in the complaint from the specifications previously discussed concerning the gold removal. Morrison testified that in the conferences the gold recovery devices to be installed by the owner called for an 8-foot vertical drop for the finer material (that which would pass a 1/4-inch screen) and a 20-foot vertical drop for the coarser material (that which would be retained on a 1/4-inch screen, but would pass a 1-inch screen) (R. 216-218), whereas the complaint specified the reverse, i. e., a 20-foot drop for the finer material and an 8-foot drop for the coarser material (R. 9, 32). On cross-examination, the witness conceded that the alleged reversal of the specifications in the complaint may have been due to a typographical error (R. 236). It appears from a copy in the Department's files that the letter of June 14, 1939, from appellants to Mr. Hjelm, former United States Attorney, which appellants offered in evidence (R. 351-352), but which was rejected and has not been included in the record on appeal, states as follows: "We will require an 8-foot drop for recovery of gold from 1/4-inch to 1-inch size for our sluice boxes, and a 20-foot drop for recovery of gold from 1/4 inch and under size by our Ainlay Bowls." Thus the specifications in the petition were the same as those requested in appellants' letter. Moreover, there was no attempt to show what, if any, effect the alleged variation would have had on appellants' ability to extract the gold. It does not appear that appellants could not have installed a plant with the vertical drops they desired without interfering with the other specifications set out in the complaint.

the complaint stated that if the landowners should fail or refuse to follow the method for recovery of the gold, the United States "shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants" (R. 9-10). While this statement was made in the complaint, it was not set forth in the prayer for relief when the United States specified the judgment which it sought (R. 28-34). It was obviously intended that the adequacy of the safeguards of appellants' rights to the gold should be determined before any judgment was entered and that if those rights could not be protected, an election should be made by the United States upon which alternative of the option the Government would seek judgment. Appellants recognized this because, in their answer, they alleged that further specifications would be necessary (R. 43-50). For example, after alleging that the plan set forth in the complaint might or might not be adequate for recovery of the gold dependent upon the speed of removal, the answer stated that if the defendants were unable to comply, an exact determination of their loss could not be made (R. 45-46). Thus, it is clear that if the Government had not abandoned the project, such deficiencies as might have existed in the complaint would have been remedied by amendment so that no gold would have been taken. Cf. *Karlson v. United States*, 82 F. 2d 330, 331 (C. C. A. 8, 1936).

If appellants' rights to the gold are safeguarded, the gravel by itself would not warrant a recovery. As appellants state (Br. 6): "It has no value for any other purpose [than gold mining] except the removal of concrete aggregates, if there were any local demand for aggregates, which there ordinarily is not." Demand of the Government cannot be considered and it is clear that there was no other demand for gravel that would affect the market value of the property (R. 269-270, 411); *Cameron Development Company, Inc. v. United States*, 145 F. 2d 209 (C. C. A. 5, 1944); *United States v. Rayno*, 136 F. 2d 376, 378-379 (C. C. A. 1, 1943), certiorari denied 320 U. S. 776.

We submit, therefore, that appellants' contention here is not well founded because even if the Government had proceeded with the project rather than abandoning it, the United States would have not taken the gold and appellants' rights thereto would have been preserved. The decision of the district courts in *United States v. 9.94 Acres of Land in City of Charleston*, 51 F. Supp. 478 (E. D. S. C. 1943); *United States v. 60,000 Square Feet of Land, Etc.*, 53 F. Supp. 767 (N. D. Cal. 1943); and *United States v. Bauman*, 56 F. Supp. 109 (D. Ore. 1943) cited by appellants (Br. 46-50) are irrelevant here since they were all attempting to solve the problems that result when the Government condemns a term for years of indefinite duration.⁹

⁹ The Government does not agree with the reasoning of these decisions and with the manner in which the courts dealt with the problem. Other courts have taken a different view of the matter. *United States v. Certain Parcels of Lands, Etc.*, 55 F. Supp. 257,

To summarize.—We submit that appellants' claim to substantial compensation cannot be sustained for three reasons. First, contrary to appellants' argument, the obligation of the United States to make just compensation cannot exceed the owner's loss. Second, the Government abandoned the proceedings and the court thereby lost jurisdiction to award compensation for the so-called profit a prendre. Finally, even assuming arguendo that compensation could be awarded for the taking of the interest described in the complaint, it could not be the basis of an award of substantial compensation because rather than taking the gold, appellants' rights thereto were preserved, hence the only substantial value of the land was retained by them.

II

The trial court did not err in his rulings admitting and rejecting evidence

Appellants' statement of points to be urged upon appeal referred to certain alleged errors in the admission or rejection of evidence (R. 447-448). However, their brief does not contain any specification of errors relied upon as required by Rule 20 (2) (d) of this Court and, although some of the evidence and the rulings thereon are set out in the brief, and on page

262-264 (D. Md., 1944); *United States v. Improved Premises*, 54 F. Supp. 469 (S. D. N. Y. 1944); *United States v. 16.747 Acres of Land*, 50 F. Supp. 389 (Del. 1943); *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark. 1918); *United States v. 5.741 Acres of Land in Flushing & Arde Bulova*, 51 F. Supp. 147 (E. D. N. Y. 1943); *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258 (S. D. N. Y. 1944).

26 it is stated that appellants assign as error a certain ruling, no separate argument is presented to support these points on appeal. Assuming that the points have been preserved, we submit that the rulings did not represent reversible error.

While point 2 complained of the admission of evidence of the market value of the land (R. 448), appellants admit that the value of the so-called profit a prendre for which they claim compensation "of course, cannot exceed the value of the fee" (Br. 46). Thus, on appellants' own theory the market value evidence was admissible and appellants' claim for \$12,000 (Br. 51) is based upon the testimony of Government witnesses on cross-examination that the value of a right to remove gravel and minerals had the same value as the fee (Br. 30-33). Appellants do not challenge the finding of the district court that no gravel had been removed (R. 87) and appellants' counsel conceded below that this was the fact (R. 137). Thus points 1 and 3 (R. 447-448) present simply the legal question already discussed *supra*, pp. 12-21, whether appellants were entitled to substantial recovery when no gravel was actually taken.

Points 4, 5 and 6 (R. 448) relate to rulings permitting the Government to show the amount of gravel which had been estimated to be required for the Rucka-Chucky Dam (R. 106), rejecting appellants' attempt upon cross-examination to show that the Government intended to use the gravel at any site where this gravel would be more available and gravel would be required (R. 118-119) and excluding "proof offered by de-

fendants of negotiations” prior to the filing of the suit (R. 448). No mention is made of this last point and a great quantity of evidence was admitted concerning those negotiations (R. 207–212, 215–225, 278–284). This point on appeal (R. 448) apparently referred to the testimony of counsel for appellants (R. 337–357). One ground of the Government’s objection was that the court already knew what the negotiations were and the matter was time-consuming (R. 338, 340). Appellants’ argument does not tend to show error in the exclusion of this evidence.

The ruling attacked in Point 4, the admission of evidence as to the estimated amount of gravel needed for the dam, was clearly correct since the complaint sought the right to remove concrete aggregates “in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir project” (R. 11). The United States was seeking to acquire the right to remove gravel only for the Ruck-a-Chucky project (R. 4; Rivers and Harbors Committee Document No. 50, 74th Cong., 1st sess., pp. 3, 8, 25, 27) hence it was obviously relevant to show how much gravel might be needed for that project. *Karlson v. United States*, 82 F. 2d 330 (C. C. A. 8, 1936). Since the complaint limited use of the gravel to the Ruck-a-Chucky Dam, appellants’ attempt to show that it might have been used on other dams was correctly rejected because the evidence would have been irrelevant. Moreover, all

of these objections become material only if the Government's contentions (*supra*, pp. 12-21) that it is not liable to make compensation for what it might have taken, but didn't, is rejected.

Appellants make the statement that if they had mined the gold during the period of the Government's occupancy they would have effected a net recovery of \$138,000 to \$150,000 and that, therefore, they lost interest amounting to \$18,515 to \$20,125 (Br. 16). However, they do not challenge the findings of the court below that there was no diminution in value of the land and that defendants have suffered no pecuniary loss beyond use and occupancy of the land for which just compensation was fixed at \$1,745, plus interest (R. 87-88). Inasmuch as the best use of the property was for mining (R. 372, 425) the award for use and occupancy compensates appellants for the exclusion of them from the property. The award represents computation of interest upon the fee value of the property (R. 82, 386, 426-427). It is pure speculation as to how much gold there was in the property and as to what profits appellants might have realized therefrom. For example, it does not appear that the evidence upon which they rely for their assertion (Br. 7) included the cost of machinery, equipment, transportation and other costs involved in completing the sale of the gold (R. 336-337, 428). The possibilities of favorable operations are reflected in the market value of the property and they have been compensated for in the award made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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FEBRUARY 1946



No. 11,142

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR,
W. H. MORRISON and R. J. MIEDEL,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for
the Northern District of California, Northern Division.

APPELLANTS' CLOSING BRIEF.

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FILED

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PAUL P. O'BRIEN,
CLERK

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APPELLANTS' CLOSING BRIEF.

INTRODUCTION.

In its brief, respondent makes a number of assertions of fact which are not sustained by the evidence, and which are unwarranted inferences from facts which were established or statements made in appellants' opening brief. Respondent, further, bases its argument in a large part upon decisions which are not at all applicable to the facts before this Court, and, since the propositions which they declare must be read and understood in the light of the facts of those cases, we here point out to this Honorable Court the fallacy of respondent's argument.

At the time this reply is composed, appellants have received only a typewritten copy of respondent's brief. Necessarily, therefore, no reference can be herein made to the printed record. This requires that appellants' closing argument follow in sequence the argument of respondent, and that reply to fallacies in respondent's argument be made in sequence. By any other approach it would be impossible for appellants to direct the attention of this Honorable Court to the specific portion of the respondent's brief to which answer is made.

For the greater convenience of this Honorable Court, instead of adopting as titles statements of law and fact favorable to appellants and arguendo their cause, we have copied verbatim the titular divisions of respondent's brief, and under each title follows our reply thereto.

ARGUMENT.

I.

"APPELLANTS WERE NOT ENTITLED TO RECOVER A SUBSTANTIAL AWARD FOR THE ALLEGED TAKING OF THE RIGHT TO REMOVE GRAVEL AND GOLD WHICH WAS NEVER EXERCISED."

Under this heading respondent asserts:

"Moreover, appellants admit that they have not actually suffered monetary loss (Br. 2)."

By this statement respondents must refer to this portion of appellants' opening brief:

“The District Judge tried the case, made his findings and rendered his judgment under the misconception that he was sitting as a Court of Claims to determine the actual monetary damages which appellants sustained as a result of the limited exercise by the United States of America, respondent, of the rights and privileges”

(App. Br. 2-3.)

or else to this portion:

“that this disregard of testimony was the result of a determination, not of injury in law when the rights and privileges were taken, but of monetary loss in fact after the rights and privileges taken had expired and respondent had, through no fault of appellants, failed to enjoy those rights and privileges to the full extent that they were taken.”

(App. Br. 3.)

It is thoroughly possible that in the making of those statements we did not point out with sufficient clarity the distinction we had in mind. That such may have been the case, with the permission of this Honorable Court, may we try again?

First, there are two concepts of loss to the private land owner. First there is his actual loss, which includes the profit which he intended to earn from the full enjoyment of his property. That is the profit, the acquisition of which would have induced a mining man to have paid appellants \$12,000 for property which was useless if it could not be used for mining. Appellants concede that not only can they not recover those anticipated profits in this action, but they can-

not even recover interest on the anticipated profits, no matter how certain they may have been, for the delay of their realization. Even although this was an actual out-of-pocket loss to appellants of \$18,515 to \$20,125, it is not such a loss as is directly reimbursable in a condemnation action. The other concept is the actual market value of the right which is taken. This is the value of the physical thing taken, at the time that it is taken, or the market value of the privilege to make special use of the thing taken, at the time the privilege to make special use of that physical thing is taken.

The District Judge introduced into the case two additional concepts. First, he ignored the monetary and uncompensable loss to appellants, and ignored the value of the privilege to make special use of appellants' land, at the time that privilege to make special use of appellants' land was taken, and instead directed his attention to the extent of the exercise of the privilege as distinguished from the value of the privilege. Second, ignoring the monetary and uncompensable loss to appellants, and ignoring the value of the privilege to make special use of appellants' land, he directed his attention to the loss arising by physical acts of exercise of the privilege to make special use of appellants' land.

For the purposes of fixing damages appellants concede that no actual monetary loss to them was directly caused by physical asportation of their land by respondent in the exercise or enjoyment of the privilege of making special use of their property. But appel-

lants do not concede that valuable rights in their land were not taken, and appellants do not concede that they have suffered no substantially compensable injury by the *taking* of the privilege of making special use of their property as distinguished from the *enjoyment* by respondent of the privilege to make special use of their property.

“A. UNDER THE CONSTITUTION, APPELLANTS ARE NOT ENTITLED TO RECOVER A SUBSTANTIAL AWARD FOR A MERELY THEORETICAL TAKING.”

Under this heading, respondent cites *Marion etc. Railway v. United States*, 270 U.S. 280 (1926), for this assertion:

“When the United States sets out to acquire private property for public use but never exercises the rights originally sought, the owner is entitled to recover compensation only for what he has actually been deprived of.”

This decision is clearly distinguishable on its facts, and the Supreme Court had no intention of prescribing a rule to apply to the facts of this case. There, Act of August 29, 1916, Chapter 418, 39 Stat. at L. 619, 645, *empowered* the President to take over the railroads. By Proclamation of December 26, 1917 the President recited:

“(I) do hereby * * * take possession and assume control at 12 o'clock noon of the twenty-eighth day of December, 1917, of each and every system of transportation * * * Consisting of railroads * * *.”

Marion etc. Railroad v. United States, 279 U.S. 280, 282.

In that case the Director General:

“did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities * * *. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of its traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the government, devoted the net operating income to the company’s use.”

Marion etc. Railroad v. United States, 270 U.S.
280, 282, 283.

Quite different are the instant facts where the District Court made an order placing respondent in possession (R. pp. 38-39) and the contractor engaged by respondent, armed with a copy of this order, took over the property (R. pp. 195-197, 205-206), stacked lumber on it, stored powder on it, cut and installed power poles and strung a power line (R. pp. 197-204, Def. Ex. I, J, K, L), took a small amount of gravel (R. pp. 256, 260, 271-272) and placed a lock on the gate, enabling only the contractor access to the property except that appellant Morrison was given access to a cabin located thereon (R. p. 206) and otherwise excluding appellants from mining for one year and eleven months.

Respondent continues:

“presumably they (appellants) would say that the *Marion Ry* case is inapplicable because it was instituted in the Court of Claims”. (Parentheses added.)

Instead, appellants say that this Court found, and respondent does not challenge that finding,

“That plaintiff entered into possession of said land on the 17th day of October, 1939; that plaintiff abandoned the land subject of this action on September 13, 1941, * * *.”

(R. p. 87.)

Whereas in the “*Marion Ry*” case, as we pointed out above, there was no physical taking of the railroad’s property whatsoever.

Thus *Marion etc. Railroad v. United States*, 270 U.S. 280 (1926), is only authority for the proposition that a legal taking without any physical interference is not compensable.

In appellants’ opening brief (pp. 33-37), we pointed out that the respondent took the intangible, but well recognized in law, profit à prendre to remove gravel for one year and eleven months. Since the complaint prayed:

“such right, power, and privilege of use and occupancy of said land the removal of concrete aggregates from and out of said land to be uninterrupted during said period * * * *free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy* * * * (italics ours)

(R. p. 32)

and the order for possession provided:

“plaintiff is hereby authorized to take possession of said land * * * in the manner set forth in said complaint”

(R. pp. 38-39)

the distinction between *Marion etc. Railroad v. United States*, 270 U. S. 280 (1926), can be more clearly seen by an answer to the question, What became of appellants' right to mine their own land during that one year and eleven months? If that right to mine without interference from respondent remained at all times in appellants, the cases are parallel. If there was an interference, they are not parallel, and the decision in *Marion etc. Railroad v. United States*, 270 U.S. 280 (1926), has no application to the instant case.

Respondent concludes this portion of its argument:

“As we have pointed out, *supra*, the judgment below represents adequate compensation for the actual loss that has been suffered by appellants * * * to award appellants any substantial sum for the technical taking of the so-called profit à prendre would be ‘unjust to the public.’ ”

Again, appellants point out that respondent's argument, like the opinion of the District Judge, confuses the specific property with the intangible right to enjoy that property; confuses the right to subject appellants' property to certain uses with the extent of enjoyment of that right. In so far as the extent of the enjoyment of that right is concerned, appellants concede there was but a “technical taking”, in so far

as the incorporeal right to enjoy is concerned, there has been an actual taking for which no compensation has been paid.

“B. AFTER ABANDONMENT BY THE GOVERNMENT THE COURT BELOW LACKED JURISDICTION TO AWARD COMPENSATION FOR THE ALLEGED TAKING OF A PROFIT A PRENDRE:”

Respondent introduces its argument with these words:

“When private property is sought to be acquired under the power of eminent domain, unless it is acquired under specific statutory proceedings otherwise, the title does not pass until compensation is actually paid to the owner.”

To support this assertion, respondent cites *Hanson Co. v. United States*, 261 U.S. 581 (1923), and *Danforth v. United States*, 308 U.S. 271 (1939), in neither of which cases was there a physical taking involved, and in both of which cases the Court was discussing the general power reserved in the Constitution, 5th Amendment, in the absence of any special statute.

Respondent continues:

“Thus, even when possession of the property has been taken under court order in the course of a condemnation proceeding the United States may still abandon the proceedings to acquire the interest sought. * * * In such event, it is not liable for the estate or interest which it sought to acquire under its complaint in condemnation. * * * the trial court had no jurisdiction to award compensation for the interest sought in the petition after the United States filed its notice of abandonment.”

In each of the cases cited by respondent, condemnation was sought of something corporeal. In each case the general rule was applied, as laid down in *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641 (1890):

“the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon * * * is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner,”

Cherokee Nation v. Southern Kan. R. Co., 135 U.S. 641, 659 (1890)

and each decision winds up with a holding of which the following is typical:

“Enough has been said, we think, to show that the United States were free to abandon the condemnation proceeding at any time before payment of the award and transfer of title, that they took no title until payment, and the possession of the land by the United States did not make these rules inapplicable, and therefore the District Court in North Carolina had no authority to render a personal judgment against the United States.”

Moody v. Wickard, 136 F. (2d), 801, 804 (App. D.C., 1943).

Appellants concede that had the United States sought to condemn physical gravel, all or any part of the physical gravel in place upon appellants' land, these rules would apply and the District Court would

have been compelled to dismiss the proceedings and without jurisdiction to render any judgment in this action. Appellants' right to relief in such a case would be by independent action under the Tucker Act, 28 U.S.C.A. § 41.

But it does not follow, as respondent argues:

“Consequently, the fact that Section 5 of the River and Harbor Act * * * authorized the United States to take possession of the property pending the condemnation proceeding did not * * * create a vested right in the owners to compensation for the interest described in the complaint.”

In our opening brief we pointed out (Br. pp. 33-37) that the United States took nothing corporeal; it elected instead to take an incorporeal right, which, as defined in the complaint, and as provided by U.S. Code, Title 33, Section 594, started to run in October 17, 1939, and continued to run until September 13, 1941. By the very nature of the incorporeal right taken it had to vest in the United States when it was taken by entry into possession on October 17, 1939, and had to remain vested until September 13, 1941, on which date the United States could divest itself only of the unexpired portion of that right from September 13, 1941 to October 17, 1941, and by the very incorporeal nature of that which it had taken could not divest itself of the expired, consumed portion of the incorporeal right taken. To that extent it could not give back the intangible right, the privilege of enjoying which had belonged to the United States,

because that portion of the privilege was no longer in existence to return.

“Abandonment” presupposes something to abandon or give back. To the extent that a thing has ceased to exist it cannot be abandoned or given back. The declaration of abandonment is not the giving back, it is but evidence of a wish to give back. In order to “give back” anything, that which is given back must be at least in existence, and not be less even than its ashes or spirit.

Abandonment of a condemnation proceeding must be a complete surrender of the project so far as the land involved is concerned.

Robertson v. Hartenbower, 120 Iowa 410, 94 N. W. 857.

By the word “abandonment” is ordinarily understood a yielding, ceding or giving up. There can be no “abandonment” when the entire property is destroyed and there is nothing left to give up.

Cumberling v. McCall, 2 U. S. (2 Dall.) 280, 283.

See also Words & Phrases, Perm. Ed.,

“Abandon; abandonment-Relinquishment.”
Vol. 1, pp. 53-56.

Since by the very nature of the right which respondent itself chose to take it could not give back the consumed portion of that right, the declaration of abandonment was to that extent ineffective, and could not any more divest the District Court of jurisdiction to make an award for the incorporeal

profit à prendre than did it divest the District Court of jurisdiction to make an award for one year and eleven months of possession which respondent could not return to appellants, and from which award respondent has not appealed.

This is the perfect answer to respondent's argument:

"Thus when the United States filed notice of abandonment * * * the court lost jurisdiction to award compensation for the profit a prendre which, appellants claim, was sought in the petition. The only liability of the government after abandonment was for one year and eleven months' occupancy of the property."

There is no logic to the position taken by respondent that the Court had jurisdiction to award compensation for possession of the physical land, which possession could not be abandoned, yet lacked jurisdiction to award compensation for vesting of the portion of the incorporeal right which could no more be abandoned than could the physical possession of the land which concurrently existed.

"C. IN ANY EVENT, APPELLANTS HAVE BEEN AWARDED COMPENSATION FOR ALL RIGHT WHICH THE GOVERNMENT SOUGHT TO CONDEMN."

Respondent opens its argument under this heading with these words:

"It may be assumed that the rights thus described are properly designated by appellants as an 'incorporeal profit a prendre.' Although the right of 'uninterrupted use and occupancy' * * *

described would seem to be a separate and distinct right, broader than the mere right of entry for the purpose of removing the gravel, it is not believed that the Government's liability turns upon any technical distinction as to the exact nature of the estate or interest sought and that a precise definition is unnecessary''.

We pointed out in our opening brief (Br. pp. 46-51) that the peculiar incorporeal right selected for condemnation was the selection of the United States. We also related evidence of the prior negotiations (Br. p. 8) to show that the peculiar right was not an accidental selection, but the deliberate selection by respondent in carrying into effect a desire to be unlimited and unrestricted in the exercise of the rights sought in appellants' land. We also referred, and again refer, to the record (R. pp. 251-252) that the right sought was valued by the respondent at \$11,875 at least, and, with proper safeguards, had a value of 10¢ per cubic yard of gravel removed in addition to the \$11,875 figure. (R. pp. 221-223.)

This language above quoted from respondent's brief suggests an attempt to avoid an incorporeal right, expressly and deliberately defined in the complaint, and to liken that incorporeal right to a corporeal right and to assess damages for its taking accordingly. It is submitted that damages for the taking of an interest in real property are incapable of ascertainment without an understanding and definition of the "exact nature of the estate or interest sought". Authorities

on our position appear in our opening brief. (Br. pp. 46-51.)

Respondent continues:

“the testimony does not warrant appellants’ assertion that the ‘safeguards’ set out in the complaint for the removal of the gold were of no value and could not have enabled them to recover the gold.”

The authorities are to the effect that it must be presumed, for fixing damages, that the rights taken will be exercised to the fullest extent. (Br. pp. 46-51.) Nowhere does respondent point to any limitation respondent placed upon itself as to speed of removal. Under this test it must be assumed there was and would be no limitation. The evidence amply sustains appellants’ assertion that without limitation to 100 cubic yards per hour the gold could not have been recovered. (R. pp. 223-224.)

The argument continues:

“Thus it is clear that the Government did not intend to take the gold and that if the project had been carried out no gold would have been taken by the United States. * * * the complaint stated that if the landowners should fail or refuse to follow the method for recovery of the gold, The United States ‘shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants’ * * * While this statement was made in the complaint, it was not set forth in the

prayer for relief when the United States specified the judgment which it sought * * * It was obviously intended that the adequacy of the safeguards of appellants' right to the gold should be determined before any judgment was entered and that if those rights could not be protected, an election should be made by the United States upon which alternative of the option the Government would seek judgment * * * it is clear that if the Government had not abandoned the project, such deficiencies as might have existed in the complaint would have been remedied by amendment so that no gold would have been taken''.

In the first place, such an amendment was never made. In the second place, if made it could have had no more effect on rights already vested than an abandonment, and could not have affected that portion of the incorporeal right which had already expired.

As we have pointed out, the right taken must be measured by the fullest extent to which it may lawfully be exercised. (Br. pp. 46-51.)

Nor is the decision of the Circuit Court of Appeals, 8th Circuit, in *Karlson v. United States*, 82 F. (2d) 330 (1936), of any comfort to respondent's position. In that decision it was virtually conceded that the right taken was to be considered exercisable to its fullest extent, and the easement of flooding was prevented from being construed as an absolute and permanent taking of the land itself only because the easement to flood the land was condemned pursuant to a treaty, and, as the Court stated

“In any event, if the Treaty is adhered to, as it must be presumed that it will be, the extreme or emergency high level of the lake cannot be maintained continuously, since that could only be done in disregard of the provision of the Treaty as to ordinary levels and as to uniform and continuous discharge of water.”

Karlson v. United States, 82 F. (2d) 330, 335.

In the instant case not only is there no such measure, but the full extent of the gravel to be taken was not known to respondent until long after the suit was filed. (Br. pp. 23-26.)

The argument continues:

“We submit, therefore, that appellants’ contention here is not well founded because even if the Government had proceeded with the project rather than abandoning it, the United States would not have taken the gold and appellants’ rights thereto would have been preserved”.

Appellants submit that the expressions of opinion of counsel in Washington, D.C., as to their thoughts on the extent that the Sacramento Office of the War Department Engineers intended to or would have exercised the rights which they condemned are of little help now. They would have been very helpful if they had been incorporated in the complaint. As we have seen, they were not so incorporated.

II.

“THE TRIAL COURT DID NOT ERR IN HIS RULINGS
ADMITTING AND REJECTING EVIDENCE.”

What assertions are made by respondent under this heading are adequately answered in appellants' opening brief, and no specific reference thereto is herein made.

CONCLUSION.

By way of summary of the foregoing argument, appellants assert the following propositions:

First. Appellants were entitled to a finding by the District Judge of the value of the incorporeal profit à prendre taken by respondent, that value to be fixed as of the date of taking, October 17, 1939, and to sustain which the record contains ample evidence, without diminution by reason of any unexpressed limitations of quantity to be taken or any possible later failure to fully enjoy the rights taken.

Second. The Court did not lose jurisdiction to award this compensation by the filing of the declaration of abandonment because the used and consumed portion of the incorporeal profit à prendre could not be abandoned back.

Third. The award must either be on the theory appellants' rights to the gold were not adequately preserved, or, if they were, that the sum of \$11,875 which

it would require to preserve those rights be given due and proper consideration.

Dated, Berkeley, California,
February 27, 1946.

Respectfully submitted,

FRANCIS T. CORNISH,

Attorney for Appellants.

No. 11,142

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR,
W. H. MORRISON and R. J. MIEDEL,
Appellants,
VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

FRANCIS T. CORNISH,
American Trust Building, Berkeley 4, California,
Attorney for Appellants
and Petitioners.

FILED

JUN 7 - 194

PAUL P. O'BRIEN

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IN THE
United States Circuit Court of Appeals
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F. M. O'CONNOR, STELLA M. O'CONNOR,
W. H. MORRISON and R. J. MIEDEL,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable, the United States Circuit Court of
Appeals for the Ninth Circuit, and to the Honor-
able Judges thereof:*

The appellants F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel hereby petition this Honorable Court and the Honorable Judges pursuant to Rule 25 of the rules of this Honorable Court to grant to these petitioning appellants a rehearing of the cause after decision by the Honorable Garrecht, Denman and Orr, Circuit Judges, which decision was filed herein on May 9th, 1946.

These petitioning appellants request a rehearing because they urge that the Court should not have applied the same rule of vesting of title in the United States of America of the profit *à prendre* taken in this

case that is applied to the taking of title to corporeal property.

In so requesting a rehearing they respectfully point out to the Court that its opinion takes for granted that the United States of America took and condemned a two year profit *à prendre*, as distinguished from the two year profit *à prendre* starting on a given date, which right, of necessity, being intangible, had to vest and could not be abandoned.

ANALYSIS OF THE OPINION.

In an effort more clearly to point out the precise question we take the liberty to here set forth the portions of the opinion which leave these petitioning appellants with the sincere conviction that in rendering its opinion this Honorable Court failed to consider the fact that by the terms of the complaint and the order for immediate possession the profit *à prendre* was to commence on a specified day, to run for a specific two year period after that date, as distinguished from an abstract two year privilege. In its opinion, nowhere does the Court even refer to the specific date which was to start the privilege nor the specific date the privilege was to end.

The Court failed to pass on several assignments of error, stating

“Since we hold that the profit *a prendre* was not taken the remaining assignments concerning damages are not considered”.

(Opinion of the Court, p. 1.)

After setting forth the statutes under which condemnation proceedings were filed, the Court continues

"Under these sections condemnation of the title to the profit *a prendre* succeeds the purchase and payment for the title after the determination of its value in the condemnation proceedings".

(Opinion of the Court, p. 2.)

The opinion continues:

"The appellee did not here seek an immediate taking of the title to the profit *a prendre* under the Declaration of Taking Act * * * nor did the district court order such a taking of that title. It did not have the power to do so prior to the payment of a determined compensation. * * *

(Opinion of the Court, p. 2.)

Follows a holding that under the rule of the authorities cited, the United States of America had the right to abandon.

"Appellants concede that had the appellee sought to condemn the title to the gravel itself the above cases would apply. It contends that a different rule applies to taking the title to the profit *a prendre*, which in California is an interest in realty and not an easement, that is, title to the right to take the gravel. Appellants' argument is based upon an asserted interpretation of the language of the Act under which the condemnation is sought * * *

As seen, a profit *a prendre* is not an easement. This argument seems to be that possession of the land by one seeking such an interest in it as a profit *a prendre* vests the title while the possession of the land by one seeking the fee thereto does

not vest it. They would have the future words 'interest to be acquired' construed to mean 'interest acquired at the moment of possession', an obvious negation of the intent of the Congress.

We are unable to see any distinction between the taking the title to corporeal property and to seek an interest in realty as the profit *a prendre*. Payment must precede the taking of title and abandonment may precede the determination of the amount to be paid for the title."

(Opinion of the Court, pp. 3-4.)

This Honorable Court, by its opinion and decision has ruled there is no difference in vesting of a corporeal right taken and an incorporeal right taken. With this ruling no student of the law could justly quarrel. In fact, appellants themselves concede that the opinion and decision is to that extent good law.

Petition is made for a rehearing because the profit *à prendre* condemned by the United States of America was not just a two year profit *à prendre*: it was a profit *à prendre* for two years, TO COMMENCE ON THE DATE THE COURT MADE ITS ORDER PUTTING THE GOVERNMENT INTO POSSESSION, and to end two years after the making of that order.

Appellants do not contend, and never did contend, that title to the profit *à prendre* vested because the United States of America took possession of their land: instead they contend that by the express wording of the statute under which the condemnation was made, which language is set forth in the opinion of this Honorable Court

“The United States, upon the filing of the petition in any such proceeding, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest *to be* acquired, and proceed with such public works thereon as have been authorized by Congress”.

(Opinion of the Court, p. 3.)

the profit *à prendre* vested because the Court made the order, which, by the very language of the complaint defining the commencement and termination of the profit *à prendre*, was to start its two year period of its duration in being.

In its opinion, this Honorable Court does not discuss the exact date of commencement of this profit *à prendre* as distinguishing it from a general **two year** profit *à prendre*, the exact date of commencement and termination of which are not fixed. Nor does this Honorable Court, in its opinion specifically state that this is but a distinction without a difference.

It is with no little embarrassment and shame that appellants file this petition for a rehearing. This feeling is brought about through the inability of counsel for appellants to express himself, either in his briefs or in his oral argument, with sufficient clarity to explain that this appeal would not have been taken, nor would the case have ever been tried in the District Court, had the profit *à prendre*, by the terms of the complaint, not been defined as being

“for a period of two years *from and after the granting and entry of an order by the Court,*

granting to the United States of America immediate possession of said land, * * *.' (Italics for emphasis.)

(T. R. p. 6.)

Appellants have always conceded that the United States of America could abandon the profit *à prendre* if it had never started to run. Appellants have always conceded that mere possession of the land was of no value. Appellants have always conceded that their mining profits lost or deferred through possession by the United States of America are not recoverable damages in a condemnation action. But appellants have always insisted, not because the United States of America took possession, but because the District Court made an order granting to the United States of America the right to take possession, the profit *à prendre* started to run; that because the statute gave the United States of America *the right* to enjoy the profit *à prendre* at once it had to vest; that because it vested, its incorporeal nature made it impossible to abandon or give back the expired portion of the intangible privilege; that because the expired portion of the intangible privilege could not be abandoned, payment for that must be made.

With the permission of this Honorable Court, appellants will therefore attempt to clarify their argument on this phase of the case by a restatement.

ARGUMENT.

The right in appellants' land which appellee sought by condemnation was

“A right of uninterrupted use and occupancy of the land hereinafter described *for a period of two years from and after the granting and entry of an order by this Court granting to the United States of America immediate possession of said land*, for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir.” (Italics for emphasis.) (T. R. pp. 6-7.)

The complaint sets forth that the condemnation was pursuant to U. S. Code, Title 33, Sections 591 et seq. It is true that such proceedings must be in conformity with the California law, and that ordinarily the title to the rights condemned does not vest, under California law, until the condemnation price is paid.

Empie v. United States, 131 F. (2d) 481.

It is also true that this proceeding being under federal statute, the federal statute is controlling, taking precedence over the state law and procedure in so far as the two are repugnant. The federal statute in this case is repugnant to the state practice. It provides

“When Immediate Possession of Land May be Taken. Whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or right of way needed for a work of river and harbor improvements duly authorized by Congress, *the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: Provided, That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted.* The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid. (July 18, 1918, § 5, 40 Stat. 911.)” (Italics for emphasis.)

U. S. Code, Title 33, § 594.

In order to entitle the United States of America to an order for immediate possession, and in order to entitle the United States of America to remove

gravel at once and use it in the dam, even although compensation had neither been fixed nor paid, the complaint was so drawn as to set forth

“That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937.” (T. R. p. 12.)

This statute (U. S. Code, Title 33, § 594) and the charging allegations in the complaint are not unlike the Declaration of Taking Act of February 28, 1931, 46 Stat. 1421, C. 307, 40 U.S.C.A., Section 258(a) and the charging allegations necessary to plead under that latter statute. It is generally held that title vests when taken under this latter act. There would be no denial of due process of law were title to vest,

“Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the Court in which such proceedings shall be instituted.”

U. S. Code, Title 33, Section 594.

The right to take gravel, a *profit á prendre*, was to run, not for two years, but for a specific period

“of two years from and after the time of the granting and entry of an order by this court, granting to the United States of America immedi-

*ate possession of said land * * ** (Italics for emphasis.) (T. R. p. 11.)

The statute authorizing both the entry into possession and the order “granting to the United States of America immediate possession” of the land sought, provides, as set forth by this Honorable Court in its opinion

“* * * the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, *to the extent of the interest to be acquired*, and proceed with such public works thereon as have been authorized by Congress * * *.” (Italics for emphasis.)

(Opinion of the Court, p. 3.)

“*Profit á prendre*” is defined to be the right of taking soil, gravel, minerals, and the like from the land of another.

Black v. Elkhorn Mining Co., 49 Fed. 549, 551.

There is nothing tangible or corporeal about a profit *á prendre*. It is a mere *right to take* from the land of another. It was this intangible right which appellee sought, as distinguished from the tangible, corporeal gravel itself. U. S. Code, Title 33, Section 594 gave the appellee the right to proceed to enjoy that incorporeal privilege, even before compensation was either determined or paid. Appellants submit what more could possibly be done to vest a privilege to take from the land of another than the right to enjoy that privilege at once, right now, before compensation is either determined or paid, to the fullest extent sought?

CONCLUSION.

Appellants therefore respectfully petition this Honorable Court to grant a rehearing, to reconsider the application to the instant case of the rules laid down in the opinion and decision, and, after such reconsideration, to rule: that because the profit *à prendre* commenced on a day certain, and was to end on a day certain, notwithstanding compensation had been neither determined nor paid, and during its first 23 months the statute bestowed upon appellee the right of full enjoyment of the profit *à prendre* as condemned, the rights vested, cannot be abandoned, and compensation therefor must be paid.

Dated, Berkeley, California,
June 5, 1946.

Respectfully submitted,

FRANCIS T. CORNISH,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE UNDER RULE 25.

Francis T. Cornish, attorney for petitioners, the appellants, F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel hereby certifies that the foregoing petition for a rehearing is in his opinion and judgment well founded, and that said petition has not been interposed for delay.

Dated, Berkeley, California,

June 5, 1946.

FRANCIS T. CORNISH,

*Attorney for Appellants
and Petitioners.*

Due service and receipt of a copy of the within is hereby admitted

this.....day of June, 1946.

.....

.....

Attorneys for Appellee.

No. 11145

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation, of Saint Paul, Minnesota, and
LIVERMORE WINERY, INCORPORATED,
a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JAN 8 1946

PAUL P. O'BRIEN,
CLERK

No. 11145

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
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Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California, Southern
Division

No. 22591-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation, of Saint Paul, Minnesota,

and

LIVERMORE WINERY, INCORPORATED, a
California Corporation,

Defendants.

COMPLAINT TO ENFORCE COLLECTION
OF INTERNAL REVENUE TAXES UPON
DISTILLED SPIRITS AND TO ENFORCE
COLLECTION THEREOF UPON BOND
GIVEN TO GUARANTEE PAYMENT OF
SAME

Now comes Frank J. Hennessy, United States
Attorney for the Northern District of California,
and respectfully presents to the Court the fol-
lowing: [1*]

*Page numbering appearing at foot of page of original certified
Transcript.

FOR A FIRST CAUSE OF ACTION

I.

This is an action arising under a law providing for Internal Revenue to enforce the collection of Internal Revenue taxes upon distilled spirits. It is authorized by the Commissioner of Internal Revenue and commenced at the direction of the Attorney General of the United States, in accordance with the requirements of Section 3740 of Title 26, U. S. Code, of which action this Court has jurisdiction by virtue of the provisions of Section 41, subdivisions 5 and 9, of Title 28, U. S. Code.

II.

The defendant, Livermore Winery, Incorporated, of Livermore, California, now is and at all times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California.

III.

The defendant, Livermore Winery, Incorporated, at all times mentioned hereinafter was a distiller as defined by the provisions of Section 1158, Title 26, U. S. Code (1934 Edition) carrying on business at Fruit Distillery No. 306 located on property situated at the northeast corner of Third and Church Streets, Livermore, California, within the First Collection District of California and within the Northern Judicial District of California.

IV.

During all of the times hereinafter mentioned,

there was imposed upon distilled spirits by Section 1150 (a)(1) of Title 26, U. S. Code (1934 Edition) as amended and supplemented, a tax of \$2.00 per proof gallon, which said tax, said section of law further provided, attached to said distilled spirits when they came into existence as such. Further, subdivision (d) of said Section 1150, U. S. Code, provided that "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, [2] distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom." Said section 1150, Title 26, U.S. Code (1934 Edition) further provides in subdivision (b) thereof as follows:

"(b) Time for payment; bonded distilled spirits; distilled spirits not bonded. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law. (R. S. Sec. 3253.)"

V.

The defendant, Livermore Winery, Incorporated,

distilled at its said Fruit Distillery No. 306 during the month of December, 1936, the 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, hereinafter mentioned.

VI.

On December 26 and 27, 1936, the defendant, Livermore Winery, Incorporated, removed from the premises of said Fruit Distillery No. 306, said 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, and the tax imposed thereon by said Section 1150, Title 26, U. S .Code (1934 Edition), thereby became due and payable.

VII.

On April 23, 1937, the Commissioner of Internal Revenue, in compliance with law, levied and assessed against the defendant, [3] Livermore Winery, Incorporated, a tax of \$3,239.00 upon the said 1619.56 proof gallons of distilled spirits, to wit, brandy, removed as set forth in paragraph VI, a copy of which assessment is attached hereto as Exhibit 1.

VIII.

On May 4, 1937, the Collector of Internal Revenue, First Collection District of California, by mailing to said Livermore Winery, Incorporated, a Notice and Demand for Tax, a copy of which is attached hereto as Exhibit 2, notified the said Livermore Winery, Incorporated, of the assessment of the tax aforesaid, and demand that payment thereof be made.

IX.

On May 15, 1937, the Collector of Internal Revenue, First Collection District of California, by mailing to said Livermore Winery, Incorporated, a Second Notice and Demand for Tax, a copy of which is attached hereto as Exhibit 3, again notified Livermore Winery, Incorporated of the assessment of the tax aforesaid, and in addition thereto, a 5% penalty of \$161.92, interest of \$5.82, in accordance with the provisions of Section 1545, Title 26, U. S. Code (1934 Edition) and demanded that payment thereof be made on May 25, 1937.

X.

The defendant, Livermore Winery, Incorporated, has neglected and refused and failed to pay the said tax, penalty and interest, and continues to neglect and refuse and fail to pay the same.

XI.

The defendant, Livermore Winery, Incorporated, owes to plaintiff, the amount of said tax, to wit, \$3,239.00 together with a penalty of 5% on \$3,239.00 in the amount of \$161.92 and interest on \$3,239.00 at the rate of 6% per annum from May 4, 1937 to date [4] of payment, as provided by Section 1545, Title 26, U. S. Code (1934 Edition) (now Section 3655, Title 26, U. S. Code) as amended and supplemented.

FOR A SECOND CAUSE OF ACTION

I.

This is a Cause of Action upon a bond entered into under and by virute of the Internal Revenue Laws of the United States, through which the United States seeks to collect a sum of money equivalent to certain Internal Revenue taxes on distilled spirits, together with penalties and interest upon said sum. It is authorized by the Commissioner of Internal Revenue and commenced at the direction of the Attorney General of the United States, in accordance with the requirements of Section 3740 of Title 26, U. S. Code, of which action this Court has jurisdiction by virtue of the provisions of Section 41, subdivisions 5 and 9 of Title 28, U. S. Code.

II.

Paragraphs II, III, IV, V, VI, VII, VIII, IX and X of the First Cause of Action, are incorporated herein by reference.

III.

The defendant, Saint Paul Mercury-Indemnity Company of Saint Paul, of Saint Paul, Minnesota, now is and at all times hereinafter mentioned, was a corporation.

IV.

As required by law, the defendant, Livermore Winery, Incorporated, as principal, and the defendant, Saint Paul Mercury-Indemnity Company of Saint Paul, as surety, on the 6th day of November 1936, affective as of June 26, 1936, executed a

written instrument entitled "United States Internal Revenue Fruit-Distiller's Bond," a copy of which is attached hereto as Exhibit 4, by which the principal and surety bound themselves jointly and severally to the plaintiff in the sum of Forty-Three Thousand Five Hundred Dollars [5] (\$43,500.00) and which provided that: The subject bond was given to conform to the provisions of Section 3260 of the U. S. Revised Statutes in connection with the operations of Livermore Winery, Incorporated, as a distiller on and after the 26th day of June 1936 at premises designated as Registered Distillery No. 306; and that the said bond was intended to cover all brandy produced by the distiller at the said distillery during the period of one year, from June 26, 1936 to April 30, 1937; and to guarantee that the principal would in all respects comply with law and regulations relating to the duties and business of distillers of brandy and would pay all penalties incurred or fines imposed on him for a violation of any such laws or regulations; that he would not suffer the land on which the distillery stood or any distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time when he carried on the business of a distiller; and that he would pay or cause to be paid all taxes at the rate imposed by law therein in force, plus penalties and interest on brandy produced by the distiller. Such bond further provided that it should extend and apply equally to any change in the business address of the premises, the extension or curtailment of them, including the buildings or any part

thereof or any equipment or any other change which would require the distiller to file a new or amended notice Form 271½, excepting where the change should constitute a change in the proprietorship of the business or in the location of the premises.

V.

On May 25, 1939, the District Supervisor of the 14th District of the Alcohol Tax Unit, Bureau of Internal Revenue, acting with the authorization and upon the instructions of the Commissioner of Internal Revenue, mailed to the defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, a letter, a copy of which is attached hereto as Exhibit 5, demanding [6] that said defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company, pay the said tax together with penalty and interest thereon.

VI.

The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, have neglected and refused and failed to pay the said tax, penalty and interest, and continue to neglect and refuse and fail to pay the same.

VII.

The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally owe to plaintiff, the amount of said tax, to wit, \$3,239.00 to-

gether with a penalty of 5% on \$3,239.00 in the amount of \$161.92, and interest on \$3,239.00 at the rate of 6% per annum from May 4, 1937 to date of payment, as provided by Section 1545, Title 26, United States Code (1934 Edition) as amended and supplemented.

Wherefore, plaintiff prays judgment against the defendants Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally, in the amount of \$3,239.00 together with interest, penalties and the costs of this suit, and for such other relief as this Honorable Court shall deem just and proper.

Dated April 15, 1943.

FRANK J. HENNESSY,
United States Attorney

.....

Assistant U. S. Attorney [7]

EXHIBIT No. 1

Form [Illegible]—(Revised). Treasury Department, Internal Revenue Service. Form approved by Comptroller General, U. S., September 26, 1940.

Received May 1, 1937, Collector of Int. Rev.,
First Dist. Calif.

ASSESSMENT CERTIFICATE

First District of California, March, 1937

Distilled Spirits Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

Thomas J. Church, Chief of Division

Frank L. Blote, Bookkeeper.

I hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names or identification numbers, and that the amounts thereof are as follows:

Date April 1, 1937.

John V. Lewis,

Collector of Internal Revenue

List	Returns Filed	Excess Collections	Total Tax
March 1937—Dist Sprts	13,023.54	52.09	13,075.63
March 1937—Rectifier	4,521.52		4,521.52
March 1937—Penalties	6,771.41	2.51	6,773.92
March 1937—Brandy	3,008.43		3,008.43
Totals reported by collector	27,324.90	54.60	27,379.50
Differences found by commissioner	00	00	00
Items reported by commissioner	15,589.57	00	15,589.57
Total assessment	(42,914.47)	54.60	42,969.07

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties,

etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due as shown, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C., Office of Commissioner of Internal Revenue, April 23, 1937.

Guy T. Helvering,

Commissioner of Internal Revenue

FP-OGG-R1

INSTRUCTIONS

This form must be made each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within 10 days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within 5 days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of difference on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner.

Form 23A—Treasury Department, Internal Revenue Service. Revised March, 1922.

Page No. 504

ASSESSMENT LIST

First District of California, Stilled Spirits,
List March, 1937

	Debit	New Balance	Remarks
Livermore Winery, Inc., Livermore, Calif.	3239.00	3239.00	Tax on 1619.56 pg Bdy (Lost through negli- gence) 12-26 & 27-36.

(Here follows Exhibits 2 and 3, which are the same as Plaintiff's Exhibit No. 7.)

EXHIBIT No. 4

Bond No. 11235 Executed in Triplicate

The premium charge for this bond is
\$174 per annum

Form 301½, Treasury Department, Internal Revenue Service (Revised July 1935)

United States Internal Revenue
Superseding Bond Office Copy

FRUIT-DISTILLER'S BOND

(This Bond must be executed by every Distiller before commencing business, and on the 1st day of May in each succeeding year, as required by Sec. 3260 U. S. Rev. Stat.)

Know All Men By These Presents, That I (we)
Livermore Winery, Incorporated, a California cor-

poration, of Third and Church Streets, Livermore, California, as principal (hereinafter designated as principal) and Saint Paul-Mercury Indemnity Company, of Saint Paul, a Delaware Corporation, of Saint Paul, Minn., authorized to act as surety in the State of California, as surety (or sureties), are held and firmly bound unto the United States of America in the sum of Forty-three thousand five hundred dollars (\$43,500.00), lawful money of the United States for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assign, jointly and severally, firmly by these presents.

Whereas, every person intending to commence or to continue the business of a distiller shall give bond in accordance with the provisions of section 3260, United States Revised Statutes; and

Whereas, the principal is now engaged, or intends to be engaged on and after the 26th day of June, 1936, in business as a distiller of brandy under the name or style of Livermore Winery, Incorporated, within the 14th District, to wit, at Registered Distillery No. 306, located at N. E. Corner Third and Church Streets, Livermore, California; and

Whereas, this bond is intended to cover all brandy produced by the principal at the said distillery during a period of 1 year from June 26, 1936 to April 30, 1937.

Now, therefore, the conditions of this bond are such that if the principal—

1. Shall, in all respects, faithfully comply with all the provisions of law and regulations made in pursuance thereof relating to the duties and business of distillers of brandy; and

2. Shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and

3. Shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business; and

4. Shall pay or cause to be paid all taxes at the rate imposed by law now or hereafter in force (plus penalties, if any, and interest) on brandy produced by him;

Then this obligation is to be null and void, but otherwise to remain in full force, virtue, and effect.

We, the obligators, also agree that all stipulations, covenants, and agreements of this bond shall extend to and apply equally to any change in the business address of the premises, the extension or curtailment of the premises, including the buildings thereon, or any part thereof, or in equipment, or any other change which requires the principal to file a new or amended notice (Form 27½), except where the change constitutes a change in the prop-

rietorship of the business, or in the location of the premises.

Witness our hands and seals this 6th day of November, 1936.

Signed, sealed, and delivered in the presence of
(Seal) LIVERMORE WINERY, IN-
CORPORATED,

(Seal) By [Illegible.]
Attorney in fact.

(Seal) [Illegible.]

All erasures, interlineations or alterations on the within bond were made prior to the signing of same. [11]

Form 301¹/₂, Internal Revenue Service

FRUIT-DISTILLER'S BOND

Livermore Winery Incorporated
F. D. #306
Third & Church Sts.,
Livermore, California

District No. 14

SUPERVISOR'S APPROVAL

I hereby approve the foregoing bond, the same being executed in due form and the sureties thereon being satisfactory to me; and I hereby certify that the persons signing said bond on behalf of the

principal are fully empowered to do so, as appears by properly executed authority on file in my office.

December 1st, 1936.

J. H. MALONEY,
District Supervisor

Treasury Department, Bureau of Internal Revenue
Alcohol Tax Unit

....., 193...

Respectfully referred to the Commissioner of Accounts and Deposits, Section of Surety Bonds, Treasury Department, for examination and approval as to the within corporate surety, and return to this Bureau.

.....

Deputy Commissioner

Treasury Department, Office of Commissioner of Accounts and Deposits, Section of Surety Bonds

....., 193..

Examined and approved as to the within corporate surety.

.....

Commissioner of Accounts and Deposits

INSTRUCTIONS

1. This bond must be filed in triplicate with the District Supervisor for the district in which the distillery premises are located.

2. The name, including the full given name, of each individual party to the bond must be written in the heading thereof, and each such party shall sign the bond with his usual signature, or the bond may be executed in his name by a duly empowered attorney-in-fact.

3. In the case of a copartnership, the trade name of the firm, followed by the names of all the members thereof, shall be given in the heading. In executing the bond the firm name shall be typed or written, followed by the word "By" and the usual signature of all partners, or the signature of any partner duly authorized to sign the bond in behalf of the firm, or by a duly empowered attorney-in-fact.

4. If the principal is a corporation, the heading shall give the corporate name, the name of the state under the laws of which it is organized, and the location of the principal office, and the bond shall be executed in the corporate name, immediately followed by the usual signature and the title of the person duly authorized to act in its behalf, and the bond shall be attested under the corporate seal. If the corporation has no corporate seal that fact should be stated.

5. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary and there must be attached to the bond copies of so much of the records of the corporation as will show the official character

and authority of the officer, or attorney-in-fact, signing, duly certified by the secretary or assistant secretary, under the corporate seal, if any, to be true copies.

6. Each signature must be made in the presence of two witnesses, (except where corporate seals are attached) who must sign their names as such.

7. Bonds may be given with corporate surety authorized to act as surety by the Secretary of the Treasury, or individual sureties (of which there must be two) or by the deposit of proper collateral.

8. The sufficiency of individual sureties should be shown by affidavits made on Form 33.

9. A married woman may not be accepted as surety. If an unmarried woman acts as surety, she must include in her affidavit a statement setting forth the fact that she is unmarried.

10. The surety or sureties on the bond must have no interest whatever in the business.

11. All erasures or interlineations must be made before the bond is signed and a statement to that effect attached to the bond.

12. The penal sum named in the bond must not be less than the amount of the tax on the spirits that can be distilled during a period of 15 days by the use of the entire spirit-producing capacity of the distillery, and should be increased from time to time if each increase be made necessary by the in-

crease of such capacity, but in no case shall the bond exceed the sum of \$100,000.

13. The location of the distillery must be stated with certainty and accuracy; if in a city, village, or town, the blank should be filled as printed, if in the country, it should be described as near the nearest city, village, town, or post office.

EXHIBIT No. 5

14 BP ONS
FD #306

14th District
Form 14-133

Registered Mail—Return Receipt Requested

May 25, 1939

To: Livermore Winery, Incorporated, Third and Church Streets, Livermore, California, Principal, and Saint Paul Mercury-Indemnity Company, 60 Sansome Street, San Francisco, California, Surety.

(Attention: Mr. A. W. McIntyre.)

Demand Is Hereby Made upon you, and each of you, that you shall pay to the Collector of Internal Revenue of the United States Treasury Department, for the 1st District of California, the sum of (\$3,239.00) Three Thousand Two Hundred Thirty-Nine and no/100 Dollars in order to discharge the following described assessment for taxes upon alcoholic liquors, said assessment appearing upon the assessment rolls of said district as hereinafter described.

Tax assessed on 1619.56 proof gallons of brandy lost through negligence on Fruit Distillery Premises No. 306 on Dec. 26, 1936, at \$2.00 per proof gallon, which appears on Collector's March 1937 List, Page 504/2 \$3,239.00

together with penalties as prescribed by law and together with interest thereon until paid as provided by law.

The Collector of Internal Revenue for the 1st District of California has served notices and demands for payment of the above taxes, penalties and interest upon the principal addressee above mentioned, to wit: Livermore Winery, Incorporated, but to date the said obligation remains due, unpaid, delinquent and owing to the United States of America.

Accordingly, notice is hereby given and demand hereby made upon the above principal and surety that said obligation shall be forthwith paid and discharged and that I have in my possession that certain bond on Form 301½ dated Nov. 6, 1936, effective on the 26th day of June, 1936, wherein the above described principal is named as principal and the above described surety, to wit: Saint Paul Mercury-Indemnity Company is the surety, by the terms of which said bond the said surety obligates itself to discharge the obligations of the principal of a kind and character hereinabove described in default of the discharge of said obligations by the said principal.

Therefore, if within thirty (30) days from the receipt by the said above described surety of the notice and demand for the discharge of the aforementioned obligation the said obligation is not discharged by said principal and/or said surety, then in such event it will be the duty of the undersigned to carry out such conferences with the said Collector of Internal Revenue and the United States Attorney for the appropriate judicial district toward the end that suit may be filed upon the afore-described bond for the purpose of effecting the collection and discharge of the said foregoing liability.

J. H. MALONEY,

District Supervisor

DEH:cwt (lk) ons

[Endorsed]: Filed April 17, 1943. [13]

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT

Comes now Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, sued herein as The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, defendants above named, and file herein, as provided by law, and pursuant to authority therefor, their amended answer to the complaint on file herein, and in answer to the causes

of action and the allegations therein set forth, each for itself, admits, denies and alleges, as follows:

I.

Defendant, Livermore Winery, Incorporated, admits the [14] allegations contained in paragraphs II and X of the first cause of action and the allegations of said paragraphs as realleged in paragraph II of the second cause of action;

II.

Defendants are without sufficient information, knowledge or belief, in order to form a belief, as to the truth of the allegations contained in paragraphs I, V, VIII, and IX of the first cause of action, and said paragraphs as realleged in paragraph II of the second cause of action, and paragraphs I and V of the second cause of action, and on the ground of such lack of knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, deny each and every, all and singular, the allegations contained in said paragraphs;

III.

Answering paragraphs VI and VII of the first cause of action of said complaint, and said paragraphs as realleged in paragraph II of the second cause of action, and paragraph VII of the second cause of action, defendants deny each and every, all and singular, the allegations therein contained;

IV.

Answering paragraph VI of the second cause of

action, defendant, Livermore Winery, Incorporated, is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and on such grounds denies each and every, all and singular, the allegations contained in said paragraph, except that defendant, Livermore Winery, Incorporated, admits the allegations contained in paragraph VI insofar as said defendant itself is concerned;

V.

Defendant, Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, on the ground that it is without knowledge or information sufficient to form a belief as to the truth of the [15] allegations contained in paragraph X of the first cause of action, and as realleged in paragraph II of the second cause of action, also that portion of paragraph VI of the second cause of action, insofar as it relates to defendant Livermore Winery, Incorporated, denies each and every, all and singular, the allegations therein contained;

VI.

Defendants admit the allegations contained in paragraphs III and IV of the first cause of action, and as realleged in paragraph II of the second cause of action; also, the allegations of paragraphs III and IV of the second cause of action;

VII.

Defendant, Saint Paul-Mercury Indemnity Company of Saint Paul admits the allegations con-

tained in paragraph III of the second cause of action and that portion of paragraph VI of the second cause of action relating to said defendant;

VIII

Answering paragraph XI of the first cause of action, defendant Livermore Winery, Incorporated, denies each and every, all and singular, the allegations therein contained, and defendant Saint Paul-Mercury Indemnity Company of Saint Paul, on the ground that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph XI of the first cause of action, denies each and every, all and singular, the allegations therein contained;

And by Way of Affirmative Defenses to the Causes of Action Set Forth in Said Complaint, Defendants Allege:

I.

Refer to and incorporate herein for all purposes, as if set forth herein in full, paragraphs III and IV of the first cause of action set forth in the complaint filed herein; [16]

II.

That defendant, Livermore Winery, Incorporated, has paid all taxes legally levied and assessed upon and against said defendant in connection with any and all brandy and distilled spirits distilled at Fruit Distillery No. 306, aforesaid, and re-

moved therefrom thereafter by or with the consent or knowledge of said defendant;

III.

Defendants allege that the said 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, referred to in paragraphs V, VI and VII of the first cause of action and as realleged in paragraph II of the second cause of action of said complaint, have never been removed from Fruit Distillery No. 306, the place where, according to paragraph V of said complaint, said distilled spirits were allegedly distilled by said defendants, and that accordingly the tax imposed, levied and assessed against defendant Livermore Winery, Incorporated, has not become and is not now due or payable to plaintiff under the statutes set forth in said complaint, or otherwise;

IV.

That defendants are not indebted to plaintiff in the amounts or for the sums set forth in the first and second causes of action of said complaint, or any sum or sums whatever, in connection therewith;

V.

That on or about the 26th day of December, 1936, a quantity of distilled spirits, to wit, brandy, the amount, proof, or gallonage thereof being unknown to defendant, was distilled in Fruit Distillery No. 306 operated by defendant, Livermore Winery, Incorporated. That said distilled spirits were, on said date, deposited in Receiving Tank

No. 2 in said Fruit Distillery No. 306. That without the knowledge or consent of defendant, a person unknown, [17] caused a hose to be connected to and with the Livermore City Water system, and then to be joined and connected to an unsealed faucet, the existence of which was unknown to defendant and which unsealed faucet had been installed without the knowledge or consent of defendant, in and on the distilling material line connected with the still on said premises; That thereafter a faucet was turned on by persons unknown to defendant, and without the knowledge of defendant, so that said water from the Livermore City water system was caused to flow through said hose into the distilling material line, and then into a still located in Fruit Distillery No. 306, and which still was connected with Receiving Tank No. 2; That thereafter the still filled with water so as to cause the water therein to overflow through the vapor line, condenser and trybox and into Receiving Tank No. 2, in which an unknown quantity of distilled spirits or brandy had previously been placed; That said water flowing into Receiving Tank No. 2, as aforesaid, caused said tank to become completely filled with water and brandy so as to cause the same to and it did overflow upon and in the premises known as Fruit Distillery No. 306, and not elsewhere;

That at no time prior to the overflowing of Receiving Tank No. 2, as aforesaid, had said distilled spirits therein been gauged as to quantity, proof, or gallonage;

That thereafter, an employee of plaintiff gauged

and tested the brandy and water remaining in Receiving Tank No. 2 and concluded therefrom and on a hearsay statement submitted to said employee by a person or persons unknown, that approximately the sum of 1619.56 proof gallons of brandy previously distilled had been lost by reason of the overflowing of Receiving Tank No. 2 occasioned by the running of water therein;

That in the belief that said sum of 1619.56 proof gallons represented a determined and fixed, rather than an estimated, loss [18] occasioned by the overflowing of the water and brandy out of and from Receiving Tank No. 2, defendant, Livermore Winery, Incorporated, erroneously reported the production of the aforesaid sum of 1619.56 proof gallons of brandy and the resulting loss thereof, when in fact there has never been ascertained and determined to date the actual quantity, or proof gallons, of distilled spirits, to wit, brandy, actually produced on December 26, 1936, or the alleged loss thereafter on said date and on December 27, 1936;

That defendant cannot ascertain and does not know how much, if any, proof gallons of brandy were produced and lost by reason of the overflowing of Receiving Tank No. 2, as aforesaid;

That thereafter an unknown quantity of the distilled spirits contained in the water that had overflowed from Receiving Tank No. 2 was recaptured in Fruit Distillery No. 306 and was thereafter redistilled and all taxes due and payable thereon

were paid in the form and manner provided by law following the removal of said brandy from Fruit Distillery No. 306;

VI.

That the loss of the distilled spirits, to wit, brandy, was occasioned by and is a casualty, and was due to a casualty that occurred without any fraud, collusion or negligence of the owner thereof, namely, defendant Livermore Winery, Incorporated;

That defendant, Livermore Winery, Incorporated, was the owner of the distilled spirits lost, as aforesaid, and is entitled to have any tax levied, assessed, due or otherwise payable thereon, abated under the Internal Revenue Laws of the United States then in full force and effect and particularly Section 3221 of the revised statutes of the United States as set forth and contained in Section 2901 of the Internal Revenue Code, 1939, United States Code Annotated, title 26, Section 2901, (b) and (c) thereof which read as follows:

(b) "The Secretary, upon the production to him of [19] satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue of any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use, while stored in the fortifying room on

the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated. And when any distilled spirits are destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the storekeeper-gauger and placed in the internal revenue bonded warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified. When the owners of distilled spirits or grape brandy in the cases provided for by this section may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits or grape brandy before and without the tax being paid, the tax shall not be remitted to the extent of such insurance.

(c) If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920, February 28, 1920, c. 91, 41 Stat. 474 (U.S.C. Title 49, c. 1), or the

Merchant Marine Act, 1920, June 5, 1920, c. 230, 41 Stat. 988 (U.S.C. Title 46, c. 24), or if lost by theft from an internal revenue bonded warehouse, and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since October 28, 1919, or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Part II of Subchapter C."

also under the provisions of Section 3031, subdivision (b) of the internal revenue code, which reads as follows: [20]

(b) "The Commissioner, under the rules and regulations to be by him prescribed with the approval of the Secretary, upon the presentation of proof to his satisfaction of the loss by leakage, evaporation, theft, or otherwise, of brandy or fruit spirits, intended for the fortification of wine, from storage tanks in bonded warehouses or from steel drums filled therefrom while such drums are in such warehouse, and in the fortification room of a

bonded winery, not occurring as a result of any negligence, connivance, collusion, or fraud on the part of the winemaker or his agents. is hereby authorized to remit or refund the taxes assessed or paid upon such lost brandy or fruit spirits; Provided, However: That such remission or refund shall be allowed only to the extent that the distiller or winemaker is not indemnified or recompensed for such loss."

VII.

That to the extent of any loss suffered by defendants, neither of said defendants, nor both of them, have been indemnified or recompensed for such loss to date from any persons whomsoever;

VIII.

That as there is no tax due, payable, unpaid to plaintiff arising out of the allegations contained in the first cause of action of said complaint, or as realleged in the second cause of action of said complaint; nor has said tax, or any tax alleged to be due, been lawfully assessed against defendants; hence defendants allege that there is no sum due, payable, and unpaid from defendants to plaintiff under the written instrument set forth in paragraph IV of the second cause of action of said complaint, or at all;

Wherefore, defendants pray that plaintiff take nothing by or under its said complaint and that defendants be dismissed with their costs of suit herein incurred, that any and all liens recorded,

filed, or otherwise placed against any property belonging to defendants be released and discharged forthwith. and for such other relief as this honorable Court shall deem just and proper in the premises.

Dated: December 16, 1944.

ROBERT H. FOUKE,
Attorney for Defendants.

Authority is hereby granted to defendants to file the within Amended Answer to Complaint forthwith.

Dated: December 18, 1944.

ALBERT S. GUERARD,
Asst. U. S. Attorney, Attorney
for Plaintiff.

MICHAEL J. ROCHE,
Judge of the District Court.

[Endorsed]: Filed Dec. 18, 1944. [21]

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

It Is Ordered that there be entered herein judgment in favor of the plaintiff and against the defendants Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally, in the sum of \$3,239.00 together with a penalty of 5 per cent thereon in

the amount of \$161.92, and interest on said \$3,239.00 at the rate of 6 per cent per annum from May 4, 1937, to date of payment, upon findings of fact and conclusions of law. The respective parties will pay their own costs.

Dated: February 27, 1945.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1945. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came regularly on for trial to the Court without a jury on December 19, 1944, and from the admissions made and the oral testimony of witnesses adduced at the trial the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This suit is brought by the United States of America upon authorization by the Commissioner of Internal Revenue at the direction of the Attorney General of the United States on a Fruit-Distiller's Bond for the recovery of distilled spirits taxes alleged to have been incurred by the defendant, Livermore Winery, Incorporated.

2. Livermore Winery, Incorporated, in 1936, was and now is a California corporation, and was

engaged in the business of a fruit distiller at Third and Church Streets, Livermore, California, in November and December, 1936, and the Saint Paul Mercury-Indemnity Company of Saint Paul, Minnesota, is a corporation duly authorized to do business in California.

3. The defendants, Livermore Winery, Incorporated, as principal, and Saint Paul Mercury-Indemnity Corporation of Saint Paul, as surety, on November 6, 1936, executed to the United States of America a Fruit-Distiller's Bond, in the sum of \$43,500, for Registered Distillery No. 306, located at the Northeast corner of Third and Church Streets, Livermore, California. The bond became effective June 26, 1936, and continued to April 30, 1937; and was continued:

* * * *

that if the principal——

1. Shall, in all respects, faithfully comply with all the provisions of law and regulations made in pursuance thereof [24] relating to the duties and business of distillery of brandy; and

2. Shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and

3. Shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other

lien, during the time in which he shall carry on said business; and

4. Shall pay or cause to be paid all taxes at the rate imposed by law now or hereafter in force (plus penalties, if any, and interest) on brandy produced by him;

Then this obligation is to be null and void, but otherwise to remain in full force, virtue, and effect.

4. From December 1, 1936, to December 26, 1936, inclusive, the Livermore Winery, Incorporated, manufactured 4,578.65 proof gallons of distilled brandy of which 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on December 26, 1936.

5. The distilled brandy was in Receiving Tank No. 2 which, according to the tank gauge, contained 1,854 wine gallons at the close of business on December 26, 1936. The distiller's log showed the proof of the distilled brandy in Receiving Tank No. 2 to be 155. According to these records of measurement there were on hand at the close of business December 26, 1936, a total of 2,873.70 proof gallons of distilled brandy.

6. Some time between the evening of December 26, 1936, and the morning of December 27, 1936, a person then employed as distiller by Livermore Winery, Incorporated, attached a water hose to the distilling material line and turned the water

into the still to wash it, but failed to open the stop-line valve. As the still filled with water, there being no opening for egress, the water backed into the still column and into Receiving Tank No. 2.

7. On the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of brandy and water, and upon discovery an employee of Livermore Winery, Incorporated, shut off the water running into the still.

8. On December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture which had an alcoholic content of 51 proof, making a total of 1,101.4 proof gallons of brandy in the said tank. There were recovered from the distilling material sump 765 wine gallons of [25] water and brandy mixture which had an alcoholic content of 20 proof or a total of 153 proof gallons of brandy, which sum added to the brandy in the tank makes a grand total of 1,254.14 proof gallons of diluted brandy on hand December 27, 1936.

9. Accepting as on hand December 26, 1936, the amount of 2,873.7 proof gallons of brandy as found in paragraph 5 hereof, which is the amount most favorable to the defendants, and deducting therefrom the 1,254.14 proof gallons of brandy on hand December 27, 1936, I find that 1,619.56 proof gallons of brandy were lost through the overflow.

10. On April 23, 1937, the Commissioner of Internal Revenue certified an assessment to the Col-

lector of Internal Revenue, First District of California, in the sum of \$3,239.00 for taxes on 1,619.56 proof gallons of brandy lost through negligence December 26 and 27, 1936, which said assessment was entered on the books of the Collector of Internal Revenue on the March, 1937, Distilled Spirits List, page 504.

11. On May 4 and May 15, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

12. No part of the distilled spirits taxes have been paid on the 1,619.56 proof gallons of brandy lost as hereinbefore found.

CONCLUSIONS OF LAW

1. The tax on distilled spirits in December, 1936, as by law provided was \$2 per proof gallon. The tax attached to the distilled spirits as soon as they came into existence and became payable by the distiller upon their removal from the place where they were distilled if not deposited in a bonded warehouse.

2. The loss of the 1,619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, within the meaning of the statutes and not by casualty.

3. The 1,619.56 proof gallons of distilled brandy were removed from the place where distilled and not deposited in a bonded warehouse. The tax of

\$2 per proof gallon on the 1,619.56 proof gallons of brandy became due and payable on December 27, 1936. [26]

4. The assessment made by the Commissioner of Internal Revenue on 1,619.56 proof gallons of brandy lost through negligence December 26 and 27, 1936, was lawfully and correctly made.

5. The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, are jointly and severally indebted to the plaintiff for the sum of \$3,239, together with a penalty of 5 per cent thereon in the amount of \$161.95, and interest on the said \$3,239 at the rate of 6 per cent per annum from May 4, 1937, to date hereof in the sum of \$1,530.43.

6. Judgment in the sum of \$4,931.38 shall be entered for the plaintiff against the defendants jointly and severally; directing, however, the respective parties to pay their own costs.

MICHAEL J. ROCHE,

United States District Judge.

Dated March 28th, 1945.

[Endorsed]: Lodged March 21, 1945. Filed March 28, 1945. [27]

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 22591—R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
corporation, of Saint Paul, Minnesota, and
LIVERMORE WINERY INCORPORATED,
a California corporation,

Defendants.

JUDGMENT FOR PLAINTIFF

The above case came regularly on for trial on December 19, 1944, Frank J. Hennessy, United States Attorney for the Northern District of California, directing Albert S. Guerard, Assistant United States Attorney, appearing for the plaintiff, and Robert H. Fouke appearing for the defendants. The case was tried to the Court without a jury, and the Court having entered its findings of fact and conclusions of law it is, therefore, hereby

Ordered, adjudged and decreed that the plaintiff have and recover of and from the defendants jointly and severally the sum of \$4,931.38.

It is further ordered and directed that the respective parties shall pay their own costs.

MICHAEL J. ROCHE,
United States District Judge.

Dated March 28th, 1945.

[Endorsed]: Lodged March 21, 1945. Filed
March 28, 1945. [28]

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE
JUDGMENT

To: The Plaintiff Above Named, and to Frank J. Hennessy, United States Attorney, and Albert S. Guerard, Asst. United States Attorney, Attorneys for Plaintiff:

You and each of you will please take notice that on Monday, the 25th day of June, 1945, at the hour of 10:00 O'clock A.M. of said day, or as soon thereafter as counsel may be heard, at the courtroom of the above entitled court, at the Post Office Building, 7th and Mission Streets, San Francisco, California, the above named defendants will move this court for its order setting aside and vacating the judgment entered herein on the 28th day of March, 1945, in favor of plaintiff and against defendants. Said motion will be based on the following grounds:

That plaintiff, as the prevailing party, failed

and neglected to serve a copy of its proposed findings of fact and conclusions [29] of law upon defendants or upon defendants' attorneys as required by Rule 5, Subdivision E of the Rules of Practice of the District Court of the United States, Northern District of California.

That by reason of such failure, defendants were deprived of their opportunity to file proposed amendments to said findings.

Said motion is further based upon the affidavit of defendants' attorney, attached hereto, and upon the records and files in the above entitled action.

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Defendants.

(Acknowledgement of Receipt of Copy)

[Endorsed]: Filed June 21, 1945. [30]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT H. FOUKE

State of California,

City and County of San Francisco—ss.

Robert H. Fouke, being first duly sworn, deposes and says: That he is now, and has been since the inception of the above entitled action, the attorney of record for defendants, The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, and Livermore Winery, Incorporated, a California Corporation;

That he has never received any proposed findings of fact and conclusions of law from plaintiff, or its attorneys herein, prior to the Notice of Judgment dated April 4, 1945, at which time, findings of fact and conclusions of law had been signed and judgment entered; that proposed findings of fact and conclusions [31] of law have not, at any time prior to said April 4, 1945, been served upon him by leaving a copy of said proposed findings of fact and conclusions of law at his office, and further states upon information and belief that said proposed findings of fact and conclusions of law were never mailed to him;

Wherefore, your affiant requests that the judgment entered in the above entitled proceedings, based on the findings of fact and conclusions of law on file herein, be set aside and vacated; that said findings of fact and conclusions of law be vacated; that he be given the opportunity to file amendments to said findings of fact and conclusions of law as proposed by plaintiff herein.

ROBERT H. FOUKE.

Subscribed and sworn to before me this 21st day of June, 1945.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 21, 1945. [32]

[Title of District Court and Cause.]

MOTION TO DENY DEFENDANTS' MOTION
TO SET ASIDE JUDGMENT

Plaintiff moves the Court to deny the motion of the defendants for its order to set aside and vacate the judgment entered herein on the 28th day of March, 1945, in favor of the plaintiff and against the defendants, and bases its motion upon the Affidavit of Albert S. Guerard, Assistant United States Attorney, filed herewith, and upon the records and files in the action.

Dated: June 23, 1945.

FRANK J. HENNESSY,

United States Attorney, At-
torney for Plaintiff.

By W. E. LICKING,

Asst. U. S. Atty. [33]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO DENY DEFENDANTS'
MOTION TO SET ASIDE JUDGMENT

“§ 19201. In General

“Rule 5(b) supplements Rule 5(a). The first paragraph of the rule provides what papers must be served and upon whom they must be served while paragraph (b) prescribes the manner in which that service shall be made. It reads: ‘Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney un-

less service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.'' (Underscoring ours.)

“§19205.—What Constitutes

“Service may be made in any one of three ways. The rule provides: ‘Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court.’

“The reason for permitting service to be made by mailing or by leaving with the clerk is that the court has already secured jurisdiction over the party through personal or substituted service of the summons and complaint as provided in Rule 4. It is, therefore, valid service even though the paper mailed never actually reaches the party, since

‘service is complete upon mailing.’ Although the rule does not state that service is complete upon leaving a copy with the clerk, this would follow the same as a service by mailing.’”

Hughes Federal Practice, Jurisdiction and Procedure, Volume 17, Sections 19201 and 19205; Pages 227, 228, and 229.

[Endorsed]: Filed June 23, 1945. [34]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE JUDGMENT

Albert S. Guerard, being duly sworn, deposes and says:

That he is Assistant United States Attorney, and assigned by Frank J. Hennessy, United States Attorney, to prepare, try, and perform all necessary legal duties in connection with the above entitled action.

That on February 27, 1945, this Court ordered that there be entered herein judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$3,239.00, together with a penalty of 5% thereon in the amount of \$161.92, and interest on said \$3,239.00 at the rate of 6% per annum from May 4, 1937, to [35] date of payment, upon findings of fact and conclusions of law; that the records of the Clerk of this Court

show that a copy of the above order was mailed to defendants' attorney on February 27, 1945.

That on March 20, 1945, this affiant personally mailed to Robert H. Fouke, attorney of record for the defendants, duplicate copies of the findings of fact and conclusions of law with copies of proposed judgment, asking that he acknowledge service on one of the copies; that no acknowledgement of said findings of fact and conclusions of law and the proposed judgment was made by Robert H. Fouke, attorney of record for defendants.

That on the 28th day of March, 1945, judgment for the plaintiff was entered of record in the office of the Clerk of the above entitled Court, and the records of said Clerk show that notice of said judgment was mailed to the attorney of record for the defendants; that on April 4, 1945, an original and copy of notice of judgment were mailed to said Robert H. Fouke, attorney of record for the defendants, with request that he accept service and return the original; that a few days thereafter said Robert H. Fouke telephoned to this affiant, and stated that he had received the notice of judgment, but would not accept service thereof because he had never received the proposed findings of fact and conclusions of law and had thus been deprived of his right to file proposed amendments or additions, and urged this affiant to stipulate that judgment be suspended and he be given time to submit his proposed amendments or additions; that he was leaving in a day or two for Los Angeles, California,

and would be gone for a week or ten days, and would then again communicate with this affiant; that this affiant informed said Robert H. Fouke, attorney of record as aforesaid, that the affiant could enter into such a stipulation only upon authority of the Attorney General of the United States; that on April 11, 1945, the claim of Mr. Fouke that he did not receive findings of fact and conclusions of law which were mailed [36] to him on March 20, 1945, together with his demand for a stipulation suspending judgment until he could submit proposed amendments or additions, were communicated to the Attorney General of the United States; that on April 13, 1945, the Attorney General of the United States instructed affiant, through Frank J. Hennessy, United States Attorney, to refuse to sign the stipulation requested; that thereafter, on or about April 17, 1945, the instructions of the Attorney General were communicated by telephone to Mr. Fouke, attorney of record for defendants as aforesaid, by this affiant; that no further action was taken by the defendants until the filing of the present motion on June 21, 1945.

ALBERT S. GUERARD.

Subscribed and sworn to before me this 23rd day of June, 1945.

[Seal] L. C. JACOBSEN,
Deputy Clerk, U. S. District Court, Nor. Dist. of
California.

[Endorsed]: Filed June 23, 1945. [37]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of June, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO SET ASIDE JUDGMENT

This case came on regularly this day for hearing of motion to set aside judgment. After hearing the arguments of Robert Fouke, Esq., for plaintiff, and Albert Guerard, Esq., Assistant United States Attorney, it is Ordered that said motion to set aside judgment be and the same is hereby denied. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on March 28, 1945.

Dated: June 27th, 1945.

ROBERT H. FOUKE,
HANS A. KRUGER,

Attorneys for Defendants and
Appellants.

[Endorsed]: Filed June 27, 1945. [39]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, as Principals, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto United States of America, in the full and just sum of Two Hundred Fifty and no/100ths (\$250.00) Dollars, to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. [40]

Sealed with our seals and dated this 27th day of June, 1945.

Whereas, lately at the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court, between United States of America against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, No. 22591-R, judgments were rendered against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, and the said defendants above named have filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the State of California.

Now, therefore, the condition of the above obligation is such, that if the said The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, shall prosecute their appeal and answer all costs if they fail to make their pleas good, then the above obligation to be void; also to remain in full force and virtue.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and De-

posit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Acknowledged before me the day and year first above written. [41]

THE SAINT PAUL MERCURY-IN-
DEMNITY COMPANY OF SAINT
PAUL.

By H. C. DITTMAN.

Assistant Manager.

LIVERMORE WINERY, INCORPO-
RATED,

By G. C. CROCE.

The premium charged for this bond is ten Dollars (\$10.00) per annum.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By ROBERT WHYTE,

Attorney in Fact.

Attest G. KAHLENBECK,

Attesting agent.

(Seal of Fidelity and Deposit Company of Maryland.)

Examined and recommended for approval.

ROBERT H. FOUKE,

HANS A. KRUGER.

(Justification of Surety.)

[Endorsed]: Filed June 27, 1945. [42]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the Appellants designate that there be included in the record on appeal the following documents, records and exhibits, and all other matters required under the rules of this court or of the Circuit Court of Appeals of the Ninth Circuit to be so included.

(1) Complaint to enforce collection of Internal Revenue Taxes upon distilled Spirits and to enforce collection thereof upon Bond given to guarantee payment of same and exhibits attached thereto.

(2) Amended Answer to complaint

(3) Order for entry of Judgment

(4) Findings of Fact and Conclusions of Law

(5) Judgment for plaintiff

(6) Notice of Motion to set aside judgment [43]

(7) Affidavit of Robert H. Fouke in support of the Motion to set aside judgment

(8) Affidavit in Opposition to Defendant's Motion to set aside judgment

(9) Minute Order denying motion to set aside judgment

(10) Notice of Appeal

(11) Designation of Record on Appeal

(12) Stipulation and Order re: exhibits on appeal

(13) Cost Bond on Appeal

(14) Certified Reporter Transcript of all proceedings in the above entitled action

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Defendants and
Appellants.

Receipt of a copy of the within Designation of Record on Appeal is hereby admitted this 20th day of July, 1945.

FRANK J. HENNESSY,

Attorney for Plaintiff.

Pet T. S.

[Endorsed]: Filed July 20, 1945. [44]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE: EXHIBITS
ON APPEAL

It is hereby stipulated by and between counsel for the above entitled parties that the Clerk of this Court as provided by law and in conformity with Rule 75 of the Rules of Civil Procedure, shall

transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the hereinafter enumerated original exhibits introduced at the trial of the above entitled cause, said exhibits not constituting a part of the printed record on appeal, and that exhibits may be incorporated in and made a part of the record on appeal by reference only, said exhibits being as follows:

Exhibit No.

1. Monthly Return of Fruit Distiller—Form 15

1-A. Letter dated January 19, 1937, to Livermore Winery Re Form 15 [45]

1-B. Monthly Return of Fruit Distillers Form 15

2. Fruit Distillers Bond—Form 30½

3. Demand for payment of Tax—Form 14-133

4. Letter from Livermore Winery to District Supervisor Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, dated December 30, 1936.

5. Copy Assessment Certificate—Form 23-C

6. Original Assessment Certificate—Form 23C

7. Notice and demand for Tax, Second Motion and demand for Tax—Form 21

It is further stipulated that said exhibits shall be held by the Clerk of the Appellate Court pending the Appeal and thereafter returned to the Clerk of this Court.

Dated July 20th, 1945.

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Defendants and
Appellants.

FRANK J. HENNESSY,

United States Attorney.

By R. B. McMILLAN,

Assistant United States At-
torney.

It is so Ordered:

A. F. ST. SURE,

Judge of the United States
District Court.

[Endorsed]: Filed July 20, 1945. [46]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 15, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: August 6, 1945.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 6, 1945. [47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including September 25, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 15, 1945.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Sept. 15, 1945. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY

On this appeal, Appellants intend to rely upon the following points:

The District Court erred:

(1) In that the facts found by the Trial Court do not support its conclusions of law;

(2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;

(3) In impliedly finding that there was removed on December 26th and December 27th, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, a California corporation, at Livermore, California, 1619.56 proof gallons of brandy. There is no evidence to [49] support such finding.

(4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,010.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 proof gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is on evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence December 26th and 27th, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4th and May 15th, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated. [50]

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of \$2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of \$3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26th and 27th, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in the sum of \$3,239.00, together with a penalty of 5% thereon in the amount of \$161.95, and interest on the said \$3,239.00 at the rate of 6% per an-

num from May 4, 1937, to date hereof in the sum of \$1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and plaintiff's [51] Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said Exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, President of Livermore Winery, Inc., and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants' objection an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, lo-

cated on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection testimony of Mr. Bulfinch relating to his calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for [52] purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record plaintiff's Exhibits 1, 4, 5, 6 and 7.

Dated: September 22, 1945.

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Appellants.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Sept. 24, 1945. [53]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States of America, Plaintiff, vs. The Saint Paul Mercury-Indemnity Company of Saint Paul, etc., and Livermore Winery, Incorporated, a California Corporation, Defendants, No. 22591, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$8.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of September, A. D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk. [54]

In the Southern Division of the United States District Court, in and for the Northern District of California

Before: Hon Michael J. Roche, Judge.

No. 22,591-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, A Delaware
Corporation of Saint Paul, Minnesota, and
LIVERMORE WINERY, INC., a California
Corporation,

Defendant.

Tuesday, December 19, 1944

TRANSCRIPT OF PROCEEDING

Counsel Appearing: For Plaintiff: Albert S. Guerard, Esq., Assistant United States Attorney. For Defendant: Robert J. Fouke, Esq., Hans Kruger, Esq.

Mr. Guerard: If your Honor please, we offer in evidence a photostatic copy of Monthly Return of Fruit Distiller, Form 15, Treasury Department, executed by G. B. Antonini, as President of the Livermore Winery, Inc., before a Notary Public.

Mr. Fouke: No objection.

The Court: It may be admitted. [1]

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Guerard: Next we offer in connection with that a letter signed by Q. J. Boone, Acting District Supervisor, dated January 19, 1937, addressed to the Livermore Winery, relating to Form 15, Exhibit 1. We ask that that be marked Plaintiff's Exhibit 1-A.

Mr. Fouke: No objection.

(The document was marked Plaintiff's Exhibit 1-A in evidence.)

Mr. Guerard: Next we will ask to have marked Exhibit 1-B, because it relates to Exhibit 1, Monthly Return of Fruit Distiller, Form 15, signed by G. B. Antonini, President of the Livermore Winery, and sworn to before a Notary Public.

Mr. Fouke: No objection.

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 1-B in evidence.)

Mr. Guerard: I am going to introduce next as Plaintiff's Exhibit No. 2 a photostatic copy of Fruit Distiller's Bond, Form 30 $\frac{1}{2}$, executed on November 6, 1936, by Livermore Winery, Inc., by its attorney-in-fact, and Saint Paul Mercury-Indemnity Company of Saint Paul, by its attorney-in-fact.

Mr. Fouke: No objection.

The Court: It may be admitted.

*Page numbering appearing at top of page of original Reporter's Transcript.

(The document was marked Plaintiff's Exhibit 2 in evidence.) [2]

Mr. Guerard: We next introduce a photostatic copy of a letter dated May 25, 1936, to Livermore Winery, Inc., and signed by J. H. Maloney, District Supervisor of the Internal Revenue Department. It is also addressed to the Saint Paul Mercury Indemnity Company. The exhibit shows that it was sent by registered mail and return receipt was requested, and attached to the exhibit is a photostatic copy of the return receipt from Livermore Winery, Inc., and Saint Paul Mercury-Indemnity Company.

Mr. Fouke: No objection.

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 3 in evidence.)

Mr. Guerard: Next we offer as Exhibit 4 a photostatic copy of a letter dated December 30, 1936, signed by the President of Livermore Winery, Inc., subscribed and sworn to before A. F. Bulfinch, Inspector, to the District Supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, which is an application made for return of the tax on 1619.56 proof gallons of brandy lost by casualty, reciting the circumstances to establish the direct loss by casualty as being 1619.56 gallons.

Mr. Fouke: It is objected to on the ground that in the first place the statements therein contained are hearsay; in addition, no foundation has been laid indicating that the person who signed that

letter had the authority or was acting [3] for or on behalf of defendant, as an officer of the corporation; moreover, it sets forth data as to which no foundation has been laid.

Mr. Guerard: In reply to what Mr. Fouke has just said, your Honor upon reviewing this exhibit will find it is under the corporate seal of the corporation and it is signed by the president of the corporation. Now, if the president of a corporation is not charged with knowledge I don't know who it would be.

Mr. Fouke: Here is a photostatic copy, it is not a certified copy of the original; no foundation has been laid that the original is not available or that it is an original, nor the circumstances under which it was sent, or the parties to whom it was directed, or whether it was in fact received. None of those facts have been proved as far as foundation is concerned.

Mr. Guerard: It was received or we would not have it.

The Court: The objection is it is not the best evidence.

Mr. Fouke: The objection is on the ground it is not the best evidence.

Mr. Guerard: I have never heard of any attorney objecting to an exhibit where the signature of the president of the corporation, represented by him, is clearly indicated thereon, and with the corporate seal attached.

The Court: Let it be marked for identification.

Mr. Guerard: We will ask that it be marked for identification. [4]

Mr. Fouke: To be stricken if the proper foundation is not laid?

The Court: Yes.

(The document was marked Plaintiff's Exhibit 4 for Identification.)

MARGARET WOODS,

called as a witness by plaintiff; sworn.

The Clerk: Will you state your name to the court? A. Margaret Woods.

Mr. Guerard: Miss Woods, where do you reside, where do you live?

A. In San Francisco?

Q. By whom are you employed?

A. In the office of the Collector of Internal Revenue, San Francisco.

Q. Have you any particular title in connection with your work?

A. I am chief of the assessment section of the miscellaneous tax division.

Q. Miss Woods, I now show you a document consisting of two pages, on Form 23-C of the Treasury Department, which is an assessment certificate for the First District of California for the month of March, 1937, and ask you if this paper has been in your possession and is still presumed to be in your possession by reason of your employment by the Internal Revenue Division?

(Testimony of Margaret Woods.)

Mr. Fouke: I object to the question on the ground it calls for the conclusion of the witness, that it is compound and unintelligible and misleading, and likewise it presupposes something [5] that is not in evidence, namely, that it is an assessment certificate. It is incumbent upon the Government to prove the nature and character of the certificate and that it was properly set forth in accordance with the law which provides for the setting up of an assessment certificate.

The Court: What is this document that you have in your hand?

A. This original document is the assessment certificate which is signed and served by order of the Commissioner of Internal Revenue in Washington, D. C.

Mr. Fouke: I will object to that and move that it be stricken out.

The Court: How do you know that is his signature?

A. Well, it is the signature which our office accepts as being his signature.

The Court: Proceed.

Mr. Fouke: What is the ruling on my objection on the ground that it is not the best evidence?

The Court: I will allow the question. Objection overruled. She may answer.

A. Yes, that is right.

Mr. Guerard: Q. That shows that the amount of the assessment is \$3239, does it?

Mr. Fouke: I object to leading the witness.

(Testimony of Margaret Woods.)

Mr. Guerard: I will withdraw that.

Mr. Fouke: Might I ask at this time that it will be deemed [6] that as to any objection which is overruled an exception has been taken to the ruling?

The Court: All right.

Q. What does that document show?

Mr. Guerard: What does that document show?

A. It shows an assessment against the Livermore Winery, Inc., at Livermore, California, in the amount of \$3239.

Q. Is that all that it shows?

A. An explanation for the assessment.

Mr. Fouke: I move the answer go out, it is not responsive to the question in that it appears there are more items on there than the item to which the witness' attention has been called. The question was as to what does it show.

The Court: Is there anything else there?

Mr. Guerard: Is there anything else there on that form relating to that sum of money?

A. Yes, there is an explanation in the remarks column which states: "Tax on 1619.56 proof gallons brandy."

Mr. Fouke: If your Honor please, I am going to object to all this line of questioning on the ground that there has been no foundation laid. I would like at this time to object to this entire line of questioning because this document is not in evidence at the present time and there has been no foundation laid. As I pointed out earlier, it is

(Testimony of Margaret Woods.)

incumbent upon the Government to establish the nature and character of the [7] assessment, upon what it was based, and that it was in accordance with the law as to the method and character of making the assessment, and that the items thereon are true and correct, none of which foundation has been laid.

Mr. Guerard: You are correct as to that. There is no purpose in the question I propounded to the witness to show that that amount is the correct amount, nor that it represents the actual loss sustained by your client. I am simply identifying it as a record of the office.

Mr. Fouke: But before any of this information can be testified to, it is incumbent upon them to show the basis for that.

The Court: I don't know what is to follow, but I will allow it.

Mr. Guerard: I will follow it up with proper proof.

The Court: It will go out if it is not connected up.

Mr. Fouke: It will go out if it is not connected up?

The Court: Yes.

Mr. Guerard: If your Honor please, we will introduce this original document and ask that we be permitted to withdraw it for the purpose of furnishing a photostatic copy to the defendant. I think Mr. Fouke has intimated to me that he would

(Testimony of Margaret Woods.)

like to have a copy of it. If he does, we will have it made and we will be happy to accommodate him.

Mr. Fouke: I object to the introduction of this assessment certificate on the ground that it is not the best evidence; [8] moreover that this witness is not competent to identify the exhibit that has been offered in evidence. It purports to be signed by an individual whose signature has not as yet been identified as being the signature of the Commissioner of Internal Revenue, and moreover there has been no foundation to show that this record was made under the supervision of the witness, or that his signature was signed in her presence, or that she was familiar with the signature, and does not know it to be the signature. For those additional reasons I am going to object as well as that it is not the best evidence of the facts contained therein.

Mr. Guerard: In connection with the exhibit we now offer in evidence a certified copy of the assessment certificate now being discussed, that is, the first page thereof, which is duly authenticated with the seal of the United States of America, and recites, "Pursuant to the provisions of section 661, Chapter 17, Title 28 of the United States Code (section 882 of the Revised Statutes of the United States), I hereby certify that the annexed copies of assessment certificate, Form 23-C, and assessment list, Form 23-A, involving the case of the Livermore Winery, Inc., Livermore, Calif., are true copies of said documents."

Mr. Fouke: I wish to object to this on the

(Testimony of Margaret Woods.)

ground that it is not a true and correct copy of the documents which have been submitted and sought to be introduced in evidence, in that on [9] this second page, as your Honor will observe by looking at this exhibit, here, are set forth all of the various accounts and records on the assessment list whereas on this they single out one particular one, the one in controversy, and moreover there are interlineations in here and pencil notations which have certain meaning, which are incompetent even as to this particular loss, and therefore it is not a true and correct copy of the original.

Mr. Guerard: We are not offering it as any proof as to the amount of loss. We are simply introducing it as a part of the records of the Internal Revenue Department; we expect to follow it up by adequate proof that the amount arrived at as being due to the Government was arrived at accurately and in accordance with the statute, and the amount of loss indicated upon the paper was arrived at properly by various men whose business it is to reach this conclusion.

The Court: I will allow it to go in subject to your motion to strike and over your objection.

(The certified copy of assessment certificate is marked Plaintiff's Exhibit 5 in evidence, and original certificate of assessment was marked Plaintiff's Exhibit 6 in evidence.)

Mr. Guerard: Q. I now will show you Form 17 of the Treasury Department dated May 4, 1937—this is a copy—I now show you a copy of Form

(Testimony of Margaret Woods.)

17 of Notice and Demand for Tax, dated May 4, 1937, showing the name and address of Livermore Winery, Inc., assessment [10] \$3239, balance due \$3239, tax on 1619.56 proof gallons body distilled spirits and ask you if that notice and demand was sent out to the Livermore Winery by you?

A. Yes, the original notice was sent out by me.

Q. The original was sent out and that is a copy of the original?

A. This is a copy of the original notice which was sent.

Mr. Fouke: I am going to object to the notice as not the best evidence; the original, or copy of the original, a duplicate original copy would be the best evidence if there are such records available.

Mr. Guerard: There is no such record available. Even a copy is not kept.

The Court: The objection will be overruled. I will allow it.

Mr. Guerard: Q. On this same sheet of paper I show you a second notice and demand for tax dated May 15, 1937, to the Livermore Winery, Inc., showing the amount of tax due at that time as \$3239, 5 per cent penalty \$161.92, and interest of \$5.82, as of that date, and ask you if that is a correct copy of the notice we are now referring to and was mailed to the Livermore winery by you?

Mr. Fouke: Same objection, your Honor, that it is not the best evidence.

The Court: The same ruling.

A. Yes. [11]

(Testimony of Margaret Woods.)

Mr. Gerard: I will now introduce this as our next exhibit 7.

The Court: It may be admitted.

(The notice and demand for tax is marked Plaintiff's Exhibit 7.)

Mr. Guerard: In connection with your duties, Miss Woods, do you calculate the amount of interest and penalties?

Mr. Fouke: I am going to object to that as being a conclusion of the witness.

Mr. Guerard: Q. State whether or not in connection with your duties you do figure the amount of interest on a tax indebtedness to the Government?

Mr. Fouke: The same objection.

The Court: The objection is overruled.

A. Yes.

Mr. Guerard: In that connection and relating to the item which we have just been discussing and as shown in the previous exhibit showing the indebtedness of \$3239, have you or have you not figured the interest on this sum of money from the date of the first notice May 4, 1937, to this date, December 19, 1944?

Mr. Fouke: Objected to as a double question, "have you or have you not."

The Court: She may answer "Yes" or "No."

A. Yes, I have.

Mr. Guerard: Q. What interest did you arrive at?

(Testimony of Margaret Woods.)

A. The amount of interest computed to and including December 19, [12] 1944, was \$1481.71.

Mr. Fouke: I object to the answer and move that it be stricken, in that it calls attention to sums of money which are not set forth in the complaint or even asked for.

Mr. Guerard: The statement of counsel is not correct because the prayer asks for relief in the sum of \$3239, together with interest penalties and costs of this suit.

The Court: Let the question and answer stand.

Mr. Guerard: That is all.

Cross-Examination

Mr. Fouke: Q. What are your duties at the office of the Collector of Internal Revenue?

A. I am chief of the assessment section.

Q. As such what are your duties there?

A. My duties comprise the assessing of internal revenue taxes and the issuing of notices and subsequent notices and demands for outstanding taxes.

Q. Are there any other persons in your division that do that? A. There are.

Q. Are you under their supervision and jurisdiction?

A. Not in that section. I am chief of a section.

Q. There are others in that section?

A. Yes.

Q. And in connection with the various assessments that go out do you personally prepare all

(Testimony of Margaret Woods.)

of the notices and demands and records of the section or didn't others in that section prepare those notices and demands?

A. They do at the present time. [13]

Q. When was the procedure any different than it is at present?

A. I prepared personally and mailed all notices and demands from the 1st of October, 1936, to the end of November, 1944.

Q. And was it the practice to keep an office copy or record of all notices and demands and other papers that were prepared by you?

A. There is no office copy of notices and demands for taxes.

Q. Are there any copies of these notices and demands kept for any purpose in connection with the Department of Internal Revenue, to your knowledge?

Mr. Guerard: I don't quite understand the question.

Mr. Fouke: I mean when you send out a notice is it the custom to type but one copy of it?

A. Yes.

Q. Aren't more than one copy prepared of any notice and demand?

A. No, just the original copy is prepared.

Q. And no other one? A. No.

Q. Then how can you testify at this time, as you have, that this is a copy of the notice and demand for the taxes if in fact as you testify now there were no copies of the notices and demands typed?

(Testimony of Margaret Woods.)

A. Because that notice is an actual copy of the assessment list as it was taken off.

Q. You don't know whether this is a copy, or not, do you?

A. That is not an actual copy of the original notice of May 4.

Q. Nor is this other second notice and demand an actual copy? A. No.

Mr. Fouke: Then I am going to move that this be stricken out on the ground that they do not purport to be what they were [14] represented to the court to be.

The Court: Who prepared these copies, do you know?

A. I did.

Q. When?

A. I don't know the actual date.

Q. How did you prepare it by the office of District Supervisor of the Alcohol Tax Unit.

Q. For the purpose of this case? A. Yes.

Q. How long ago was that?

A. I don't know, but I would say it was possibly two years or more.

Mr. Fouke: This purports to be dated May 4, 1937. She prepared it five years thereafter. I would like to renew my motion to strike out. This purports to be a copy and she testified that it is not a copy of it.

Mr. Guerard: In connection with the motion to strike, I will ask the witness this question:

Q. These notices that you have testified to as

(Testimony of Margaret Woods.)

being copies of the notices sent under the date of May 4 and May 25, 1937, to the Livermore Winery, as I understand it those exhibits are not actual office copies? A. No.

Q. From what source did you prepare the copy of the notices indicated on this exhibit, how did you prepare them?

The Court: What did you get it from at the time?

A. I copied this first notice, Form 17, from the assessment list, and dated it according to the date which was listed on our [15] invoice list.

Q. Now, as to the second one.

A. I prepared that in the same manner and dated it in the same manner.

Mr. Guerard: If your Honor please, that is perfectly legitimate proof. It would be impossible in any office, even in a lawyer's office, to have copies of everything on a printed form; the printed form is used and filled out from data on hand in the office, and this young lady is testifying from data in her office and in her possession, and she prepared the original notices, and these copies were prepared from the records maintained by her.

Mr. Fouke: One of the issues of this case is the fact that due process has been observed and all of the provisions of the statute have been complied with. It is our position they have not been and this is an element of proof and it is incumbent upon the Government to establish these facts. Now, I

(Testimony of Margaret Woods.)

will ask one further question with regard to that, the information that is contained in this.

The Court: Indicate what you refer to.

Mr. Fouke: Q. The information contained, first, on this Form 17, is that information which you personally deduced from the assessment list or record as being the information that should be put on there, or does it represent a true and correct copy of the assessment list?

A. That is an entry made and transcribed from this assessment list. [16]

Q. In other words, it is a true copy?

A. No.

Q. This is your own conclusion?

A. Yes.

Q. Your conclusion might be different in one instance than in another instance, isn't that true?

A. No, I get the information from the assessment list.

Q. You use some of the information but it is not a copy of the assessment list as such in the sense there is not full information there?

A. That is right.

The Court: I will allow both of these documents to remain in evidence. Proceed.

Mr. Fouke: Subject to a motion to strike?

The Court: Yes.

Mr. Fouke: Q. In other words, it is your testimony that all records with respect to assessments and demands were under your jurisdiction and that

(Testimony of Margaret Woods.)

you personally incorporated those records in these notices and mailed them out?

A. I was charged with the responsibility of the preparation and mailing of these notices and demands at that time, yes, I was not in charge.

Q. Did you at any time have any others working with you in 1937 in the month of May?

A. There were other employees in the office.

Q. There were other employees working with you at the same time?

A. Not with me on my work, no.

Q. Did any other employee ever prepare any of these notices? A. No, they did not. [17]

Q. Isn't it a fact that other employees made out notices and records other than yourself?

A. Not notices and demands; those were my personal responsibility, and I deposited them in the mail box after I had prepared them.

The Court: Have you any independent recollection of these?

A. No, I have not.

Q. But you are satisfied that you made them up, yourself?

A. Yes, I typed them out, it was my responsibility to do so.

Mr. Fouke: But these are not copies of the records that you sent out at the time, and it was not the practice to keep a copy?

A. No.

Q. So that you cannot testify at this time that

(Testimony of Margaret Woods.)

these are copies, as they purport to be, of the notices that actually were sent out at that time?

A. No, they are not copies of the original notices.

Mr. Fouke: That is all.

Mr. Guerard: That is all.

(A recess was thereupon taken until 2:00 o'clock p.m.) [18]

Afternoon Session,

December 19, 1944, 2 P.M.

Mr. Guerard: Before proceeding there are two matters which I desire to call to the Court's attention, and that is in paragraph I of our complaint relating to the authority for bringing the action, Mr. Fouke has now stipulated as to the authority therein contained as to the first paragraph of the complaint, so it will be unnecessary for us to make any proof in that regard.

The Court: What is the stipulation?

Mr. Fouke: It is, in effect, that the Court has jurisdiction to proceed with the action as to the defendants, 1, on the basis of liability, if any, and, 2, on the basis of the surety bond that was issued, if there is any liability.

The Court: Very well. Call your next witness.

ALMON C. JONES,

called as a witness for the plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. Almon C. Jones.

Mr. Guerard: Q. Mr. Jones, what is your business or occupation?

A. I am employed in the Bureau of Internal Revenue, Alcohol Tax Unit.

The Court: In what capacity?

A. Chief of the Bond Account Division. [19]

Q. What does your activity consist of?

A. That division supervises the auditing of all the reports submitted by production plant proprietors and gaugers assigned to such plants, and also has to do with the issue of authority to operate such plants, including the acceptance of the bond and approval of the invoices filed by the proprietors.

The Court: Proceed.

Mr. Guerard: Mr. Jones, I show you now Plaintiff's Exhibit No. 4, which has heretofore been introduced, being a letter, a signed copy of a letter dated December 30, 1936, to the district supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, and signed by the President of the Livermore Winery, with the corporate seal, and sworn to before Mr. Bulfinch, an inspector, and received in the office of the inspection division on December 30, 1936, and ask you if this is a true copy, photostatic copy of the letter in question.

A. That is an exact photostatic copy of a letter

(Testimony of Almon C. Jones.)

addressed by the Livermore Winery under date of December 30, 1936, to the district supervisor, for the purpose of claiming remission of tax on a certain amount of brandy lost at the distillery during the month of December. I have in my file here——

The Court: 1936?

A. December 30, 1936. I have in my file a carbon copy of the original, here, which is signed by the president, Mr. Antonini, of the Livermore Winery, Inc., and the copy bears the corporate seal.

Mr. Fouke: If your Honor please, to the extent that the witness' answer states that it is signed by Mr. Antonini, President of the Livermore Winery, Inc., I move that portion of his answer go out on the basis there has been no foundation laid to the effect that Mr. Antonini was then or at all ever was president of the Livermore Winery.

The Court: That may go out.

Mr. Guerard: We introduced this originally, you recall, for identification, and I am now identifying it.

Q. The original copy has been in your possession for some time, has it?

A. Yes, since filing.

Q. Since filing? A. Yes.

Q. And the filing date is what?

A. December 30, 1936.

Q. This is a true photostatic copy?

A. That is correct.

Mr. Guerard: That is all.

(Testimony of Almon C. Jones.)

Cross-Examination

Mr. Fouke: Q. Were you present, Mr. Jones, at the time this letter was submitted to the department?

A. I was.

Q. Who else was present on that occasion?

A. Well, lots of different people were present, there are about fifty people in that division.

Q. Were you present on the specific occasion that the letter, itself, was delivered to some individual in the department?

A. That letter with an inspection report was received by me.

Q. This was received by you? A. Yes.

Q. Did Mr. Antonini deliver this to you personally? A. No, he did not.

Q. Then you don't know whether Mr. Antonini signed this, at all, do you? A. No.

Q. Do you know by whom this was prepared?

A. I have no idea.

Q. Isn't it a fact that it was typed in the office of your department on the day in question?

A. I have not any reason to believe that was the case.

Q. But it was not delivered to you with an inspection report? A. Yes, it was.

Q. By some other person, but not by Mr. Antonini? A. That is right.

Q. You don't know Mr. Antonini, do you?

A. No.

(Testimony of Almon C. Jones.)

Q. You don't know his signature?

A. No, I do not.

Mr. Fouke: No further questions.

ARTHUR F. BULFINCH,

called as a witness for Plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. Arthur F. Bulfinch.

Mr. Guerard: Q. Mr. Bulfinch, what is your position, if any, with the Government?

A. Inspector in the Alcohol Tax Unit, Bureau of Internal Revenue.

Q. Were you so employed in December, 1936?

A. I was.

Q. I now show you Plaintiff's Exhibit No. 4, which has been [22] introduced in evidence here a few moments ago——

Mr. Fouke: Just a moment. This was not offered in evidence, it was offered for the purpose of identification. Are you now offering it in evidence?

Mr. Guerard: When I get through here I am going to offer it in evidence. I am going to prove the signature of the man first.

Q. Was that letter signed in your presence?

A. That was signed in my presence, yes.

Q. Whom was it signed by?

A. Mr. Antonini, the President of the Livermore Winery, Inc.

(Testimony of Arthur F. Bulfinch.)

Q. Did he take an oath that it was correct?

A. He subscribed to it and swore to it.

Q. And you are a qualified person to administer oaths, are you, under the statute of the United States?

A. As an inspector in the Internal Revenue Service I am.

Q. Was the seal of the corporation placed upon the second page of this document in your presence? A. Yes, it was.

Mr. Guerard: Now, if your Honor please, we offer Exhibit 4 For Identification in evidence.

Mr. Fouke: Before it is received in evidence I would like to cross-examine the witness.

The Court: You may.

Mr. Fouke: Q. Mr. Bulfinch, on December 30, 1936, do you recall where you were on that day?

A. For the purpose of [23] identifying where that was signed?

Q. Just answer my question.

A. I was in San Francisco.

Q. Just where in San Francisco were you at the time?

A. During part of the day I was in the office of the Alcohol Tax Unit, and I was also present at the office of F. E. Mayhew, at which point Mr. Antonini signed that paper.

Q. What time of the day was it that you were at the office of Mr. Mayhew?

A. I believe it was in the morning.

Q. Where is the office of Mr. Mayhew located?

(Testimony of Arthur F. Bulfinch.)

A. They had moved several times, but I believe it was at 1182 Market Street at that time.

Q. Who was present on that occasion?

A. Mr. Antonini and Mr. Groci, one of the partners of the winery.

Q. Was Mr. Mayhew present?

A. Mr. Mayhew I do not believe was present. I do not believe he was living at that time.

Q. In 1936?

A. I do not recall just when he did die.

Q. Did you go any place else in the City and County of San Francisco in connection with your official duties on that day?

A. I could not answer that.

Q. Do you know whether you did not go some place else on that day?

A. No, I could not say that.

Q. What is your best recollection as to what you may have done on that occasion?

A. It is probable that I had other duties to perform.

Q. Then you witnessed the signature of this document in the [24] office of Mr. F. E. Mayhew?

A. Yes.

Q. Do you know where the office of the Livermore Winery was located on December 30, 1936?

A. I was familiar with their Livermore office, but not their local office.

Q. Isn't it a fact that they had an office in the City and County of San Francisco, State of Cali-

(Testimony of Arthur F. Bulfinch.)

fornia, on that date, where their business was transacted? A. They probably did.

Q. To the best of your recollection did you appear at that office?

A. No, I did not go to that office.

Q. Do you recall ever having gone to that office?

A. I don't know whether it was the same office that they had at that time, or not. Sometime later they had an office on Fillmore Street, and I was there, but I don't know whether that was the same office they had at that time, or not.

Q. Did you go to an office on Clay Street?

A. I do not believe I did.

Q. But you did not go on that particular day?

A. No.

Q. Do you know who prepared this letter?

A. It was probably prepared in the office of Mayhew & Company, who were their brokers.

Q. Do you know from what source the statistical data that appears on this letter was procured?

A. Might I see that?

Q. Yes.

A. It is identical with the information that I received at the winery at the time.

Q. Isn't it a fact that you made that information available on that occasion?

A. I rather believe I did at the time.

Q. Isn't it likewise a fact that the other information that [25] was contained in here and included in the letter was information which you submitted for inclusion in the letter?

(Testimony of Arthur F. Bulfinch.)

A. From the facts as I had found them at their winery, and from any other information which they had they prepared that claim for remission of tax.

Q. So this purports to be a claim for remission of tax? A. That is correct.

Q. It was from information which you supplied at Mr. Mayhew's office on December 30, 1936?

A. It was at least partly from that information.

Q. Is there any portion of that that was not from that information?

A. That is all the information I had, but I could not say that I provided it to them.

Q. Didn't you in substance tell them exactly what took place here, and didn't they then at that time, and while you were there, prepare this letter?

A. We had a discussion about what had taken place.

Q. Didn't they, upon your representation that such information should be set forth, write this letter?

A. In any claim or any kind of loss before any action can be taken on either allowing or disallowing the loss there must be information based on the fact for submitting that claim.

Q. Upon information which you provided to them?

A. That would not necessarily be information that I provided, because that was four days after the loss, and it would appear that they [26] would have access to all the information at the plant, just as I had got it.

(Testimony of Arthur F. Bulfinch.)

Q. But so far as you know this was prepared at that time, and did you observe who prepared this?

A. I don't recall who did prepare that.

Q. Might I ask you whether or not the gentleman whose signature you attested or swore to it prepared it personally?

A. I do not believe he did prepare it personally.

Q. Did you observe that he read this over?

A. He read it over.

Q. Do you know whether he read it over quickly, or not?

A. He read it over very normally and discussed it at the time.

Q. Do you know Mr. Antonini?

A. I did know him at the time.

Q. Do you know what nationality he is?

A. That I could not say.

Q. Do you know whether he speaks English very clearly?

A. Reasonably.

Q. Does he speak as reasonably clearly as I do, for example?

Mr. Guerard: I object to that as calling for the conclusion of the witness and not proper cross-examination.

The Court: In order to identify him I will allow it. Do you recall?

A. I have not seen Mr. Antonini for a least six years.

Q. What is your memory of him?

A. I do recall that he was there, and that he signed the paper, that is, after discussing it, and

(Testimony of Arthur F. Bulfinch.)

that I asked him before he signed if that was the true facts of the case, and he said yes. That was his statement. [27]

Mr. Fouke: Q. Do you recall that he spoke good English?

A. He could speak English, I don't recall how well he did.

Q. Was the seal that purports to be the seal of the Livermore Winery impressed upon the original of this document at that time in your presence?

A. Yes, it was.

Q. And you saw this seal at that particular place? A. Yes.

Q. I am asking you whether you saw the seal.

A. I saw the seal in the place.

Q. And you were present at the time?

A. Yes.

Q. And was at Mr. Mayhew's office?

A. Yes.

Q. Then you subscribed to this immediately thereafter? A. Yes.

Q. Then what, if anything, was done after that time? A. That was submitted with my report.

Q. By whom?

A. By me to the chief inspector of the division.

Q. Did you take this away with you at that time? A. Yes, I did.

Q. You did not leave a duplicate original with Mr. Antonini? A. I am quite sure we did.

Q. You don't recall, do you?

A. Not specifically. I don't know of any case in which I have taken such a claim for remission of

(Testimony of Arthur F. Bulfinch.)

tax where I did not leave a duplicate copy with the person.

Q. Is it customary for an inspector to assist others in the preparation of claims for remission of tax?

A. To the extent of giving them information which is pertinent to the case.

Q. The inspector is supposed to advance the information to be included for the purpose of the case as he sees it? [28]

A. On the statement of facts, yes.

Q. So then on a statement of facts, it was customary for you to advance a statement of facts and have it included in the claim for remission?

A. I explained the facts that I had available to the person.

Q. Did you discuss with Mr. Antonini prior to the execution of this letter whether he knew of his own knowledge what had taken place?

A. I do not believe I did.

Q. Did he tell you anything as to being personally present at the Livermore Winery premises at any time on December 26th or December 27th, 1936?

A. I do not believe he was present.

Q. You do not believe he was present?

A. No.

Q. So that so far as any statement herein contained, it would be hearsay information that he received from somebody else?

Mr. Guerard: I object to that question on the

(Testimony of Arthur F. Bulfinch.)

ground it calls for a legal opinion and an improper question on cross-examination.

The Court: It is calling for an opinion. I will sustain the objection.

Mr. Fouke: I will reframe the question.

Q. You stated, Mr. Antonini, in your opinion, to your knowledge, was not present at the winery premises on December 26th or December 27, 1936?

A. He was not there during the time I was there on December 28th. The 26th was the night of the loss, it started at 11:50 p.m. [29]

Q. Do you know that the loss was occasioned at 11:50, started at 11:50, were you there?

A. I was not there. That was information given to me at the time I was there on December 28th.

Mr. Fouke: I move that that go out.

The Court: That may go out.

Mr. Fouke: Q. Were you at the premises at all on December 26th, 1936?

A. No.

Q. Were you on the premises or at the premises on December 27, 1936? A. December 27, no.

Q. When were you first on the premises?

A. On December 28th.

Q. December 28th? A. Yes.

Q. So that so far as you are concerned this information was information which was furnished at the time in question on December 30 by you to Mr. Antonini, and the letter was prepared and delivered to you—was prepared and signed by Mr. Antonini?

(Testimony of Arthur F. Bulfinch.)

A. I would not be prepared to say it was entirely from my information because of the fact that that information was available, and Mr. Groci, the vice-president, was at the winery on December 28th.

Q. That is, if he was there at the time?

A. He was there at the time.

Mr. Fouke: I am going to object to the introduction of this exhibit, Plaintiff's Exhibit 4 for Identification, on the ground that there has been no foundation laid showing that Mr. Antonini was at the time in question the president of the Livermore [30] Winery, or that it was executed pursuant to any authority that he might have had for or on behalf of that concern, as an officer or otherwise, nor is there any foundation laid thus far to establish that he had or could have had any actual knowledge as to the facts or circumstances set forth in this letter dealing with conditions that occurred at a time or place when he was not present, and that at best it would be hearsay evidence, and that the best evidence would be that of whosoever might be accused to have been the individual who might have been guilty of any particular act which is the gist of the cause of action sued upon here, or one of the principal causes of action. The witness could be brought in.

The Court: Who?

Mr. Fouke: The person who is referred to in this particular exhibit.

The Court: The witness saw him sign the document.

(Testimony of Arthur F. Bulfinch.)

Mr. Fouke: He saw him sign the document, but as to the facts that are set forth in the document, the point I am making is that the statements were received from Mr. Bulfinch and presented at the time to Mr. Antonini.

The Court: The witness testified the same information was available at the plant, accessible to the vice-president. I am prepared to rule on this document.

Mr. Fouke: But the point that I am making is that unless there is a foundation laid to the effect that this was within the [31] knowledge of Mr. Antonini he could not bind the Livermore Winery with the statements that appear herein.

The Court: The objection is overruled and the exhibit may be admitted.

(Plaintiff's Exhibit 4 for Identification was received in evidence.)

Mr. Guerard: Q. Mr. Bulfinch, you have just testified that you were at the plant of the Livermore Winery on December 28, 1936. Is that correct?

A. That is correct, yes.

Q. You had some conversation, didn't you, with Mr. Groci, the vice-president, or who was held out to be vice-president of the winery, did you?

A. Mr. Groci was there and we discussed the loss.

Q. You were there on December 28th?

A. Yes.

Q. Mr. Groci, the vice-president, or rather who

(Testimony of Arthur F. Bulfinch.)

held himself out to be vice-president of the winery, was also there, was he? A. Yes.

Q. Did you, together with Mr. Groci, inspect the premises? A. We did.

Q. Just go ahead and tell his Honor what observations you made on the ground when you got there on December 28th?

Mr. Fouke: I am going to object to that as calling for the conclusion of the witness, likewise the question is indefinite. The best evidence would be what he saw.

Mr. Guerard: I will withdraw that. [32]

Q. Did you go to the winery on the 28th?

A. I did. I was told to go to the winery, that there had been a loss there immediately after reporting for work at 8:30. I went by automobile to the winery, arriving about ten o'clock.

Q. Whom did you first contact when you got there?

A. Mr. Joe Renteria, the still operator, and Mr. A. C. Browning the United States Gauger, who gauged the still.

Q. Proceed.

A. At the time of the visit to the two distilleries the floor in and around the still column was wet; it was wet underneath the brandy receiving tank. The brandy receiving tank No. 2 was filled to capacity with liquid that was a mixture of brandy and water. Receiving tank No. 1 was about half full of water. There was no evidence of alcohol in that, and the sump on the floor of the distillery

(Testimony of Arthur F. Bulfinch.)

contained a mixture of water and wine sediment and brandy, with some alcohol in it. Joe Renteria at that time stated that he had been operating the still.

Mr. Fouke: I object until such time as the foundation is laid as to Joe Renteria.

The Court: Lay the foundation for Joe Renteria.

Mr. Guerard: During the inspection which you made and which you have just testified, Mr. Groci, who held himself out to be the vice-president of the winery, was present, was he?

A. Not during the early part of it. As I recall, Mr. Groci arrived somewhere around noon.

Q. And prior to that time and following that time who was present? [33] A. Joe Renteria.

Q. Did he hold himself out to be an employee of the winery?

A. He said that he was the night still operator.

Q. State whether or not he detailed to you what happened in connection with this overflow?

A. He did.

The Court: Who was present?

A. At that phase of the thing, Mr. Browning, Mr. Renteria and I were present.

Q. Was there any officer, known to you to be an officer of the Livermore Winery present on that occasion?

A. Not in the morning. However, the three of us were there in the morning, and then later in

(Testimony of Arthur F. Bulfinch.)

the afternoon, I believe it was, Mr. Groci arrived, and the whole matter was discussed again.

Q. During the time of your conversation in which you referred to Mr. Renteria being there, was there any officer of the Livermore Winery present that you knew to be an officer?

A. Not at that time.

Q. No one, at all?

A. Practically the same conversation was held later in Mr. Groci's presence, however.

Mr. Guerard: Q. We are speaking about that conversation, the conversation you spoke about, in which Browning, yourself, and Renteria were present.

A. Yes.

Q. On that occasion there was no officer of the Livermore Winery known to you to be such on that occasion?

A. I do not think Mr. Groci had arrived at that time. I do not believe he was there at that time. [34]

Q. But in the afternoon Mr. Groci was present?

A. Yes.

Q. And Mr. Renteria was also present?

A. Yes.

Q. These statements you are about to disclose were made by Mr. Renteria in the presence of Mr. Groci? A. Yes.

Q. And Mr. Renteria told you what had occurred, did he? A. He did.

(Testimony of Arthur F. Bulfinch.)

Q. Will you tell his Honor whether that was in the presence of Mr. Groci? A. It was.

Mr. Fouke: I am going to object on the ground it is hearsay at best, and that the best evidence is the individual, himself, as to what was said, and that it is not binding upon the defendant Livermore Winery, nor the defendant Saint Paul Mercury Indemnity Company, the surety under the bond.

The Court: The objection will be overruled.

Mr. Guerard: You may proceed and give the conversation.

A. Mr. Renteria said that on closing down the still for the week end on Saturday night, that would be December 26th, he had attached a water hose to a pipe line for the purpose of introducing water into the upper portion of the still so that the water would flow down from the top of the still column and clean off the sediment and undesirable residue. That he had left the premises without turning off the water, and that he had also forgotten to open a slop valve which would have allowed the water to run off.

Mr. Fouke: I am going to move that that be stricken out on [35] the ground it is not part of the *res gestae*, there has been no foundation laid, and on the ground of hearsay.

The Court: The objection will be overruled.

Mr. Guerard: Are you familiar, Mr. Bulfinch, with the general situation there, or were you

(Testimony of Arthur F. Bulfinch.)

familiar with it prior to your visit on December 28th?

A. I had made other inspections at the winery. I am fairly familiar with their two distilleries.

Q. Do you know what would follow if the valve that was just referred to was opened and not closed, and that the slop line valve was not opened—what would occur?

Mr. Fouke: Objected to as calling for the conclusion of the witness and opinion, there has been no foundation laid; the man has not been qualified as an expert or in anywise familiar with this transaction, and it is not material.

The Court: Do you know?

A. Yes.

Q. How do you know?

A. From examination of the still at that time, and from an examination of the still both before and since.

The Court: You may answer. The objection is overruled.

A. The still column would fill up with water, the water would flow up into the feeder line from the still over into the dephlegmator, from the dephlegmator would flood into the condensor, from the condensor would flow from the course ordinarily taken by the brandy at the time of being produced through a tribox on the operating platform of the still and from the tribox [36] would flow into the receiving tank.

Mr. Fouke: The same objection.

(Testimony of Arthur F. Bulfinch.)

Mr. Guerard: Q. Did you ascertain the number of inches shown on the gauge glass as to the brandy that had been run off having any certain proof?

Mr. Fouke: I will object to that on the ground it is indefinite as to time and place, moreover this witness is testifying to conditions that occurred on December 28th, two days after the alleged loss was supposed to have occurred, and not on the date when the loss was supposed to have occurred.

Mr. Guerard: We will go at it in a different way.

Q. Did Mr. Renteria give you any information in the presence of Mr. Groci as to the reading of the gauge glass on December 26 or December 27?

Mr. Fouke: That calls for yes or no.

A. Yes.

Mr. Fouke: December 26th or December 27th?

The Court: What date was it?

A. He gave me information as to the amount of brandy on hand at the time he discontinued distilling on December 26th.

Q. At the plant? A. At the plant.

Mr. Guerard: Q. What was that?

A. He had a rough log that it is customary to keep in which the still operator should write down on the log the reading of the receiving tank, and in some cases they show the number of gallons represented [37] thereby, and in this case it showed only the number of inches of brandy that was in the receiving tank.

(Testimony of Arthur F. Bulfinch.)

Q. How many did it show, according to Mr. Renteria? A. $78\frac{1}{2}$ inches, as I recall.

Q. The log that you refer to, has that any form number or anything like that?

A. No, this was just a piece of scratch paper.

Q. Does the distillery use a form called No. 15?

A. A form No. 15-C.

Q. Was that exhibited to you by anyone?

A. Well, that was exhibited to me at the time of the inspection, I believe, by Mr. Groci.

Q. Does that show or did it show the calculated yield of material from the distillery from December 16, 1936, to December 26, 1936?

A. Yes, it did.

Q. Could you give us those figures? Have you anything in your file to refresh your recollection? We want to get the accurate figures.

A. There is a copy of the report that I wrote somewhere.

The Court: We will take a recess.

(Recess.)

Mr. Guerard: Q. Mr. Bulfinch, I now hand you Plaintiff's Exhibit No. 1, Monthly Return of Fruit Distiller. Who prepared that form?

A. That was prepared by the fruit distiller.

Q. You have seen that before, have you?

A. I have.

Q. Where did you see it?

A. I did not see this particular one, that is the printed copy that is sent as a monthly report to [38] the office of the district supervisor. The fruit dis-

(Testimony of Arthur F. Bulfinch.)

tiller maintains a daily record on the same form containing the figures in pencil and I saw that form at the winery on December 28.

Q. The figures were the same as this?

A. Yes.

Q. Is that correct?

A. Yes, that is correct.

Q. These figures indicate that the calculated yield from material distilled December 1, 1936, to December 26, 1936, was 4578.65.

Mr. Fouke: I object to the question on the ground that the witness has testified that he did not see this.

Mr. Guerard: Q. Was this figure of 4578.65 furnished to you by any officer, agent or employee of the Livermore Winery on December 28, 1936?

A. The rough copy of Form 15 was furnished to me by an employee in the presence of Mr. Groci on that date. The total of the calculated yield that is shown in that form, which was submitted to the district supervisor is the same as the total on the form which I examined at that time.

Q. This form shows that there was 4578.65.

A. That is correct.

Q. Does this form also show the amount gauged out?

A. The back of that form shows the amount gauged during the month of December.

Q. Was that figure furnished to you by some agent, servant or employee at the Livermore Winery?

A. It was.

(Testimony of Arthur F. Bulfinch.)

Q. On December 28, 1936?

A. Yes it was.

Q. That form shows that the amount gauged out was 1678.02 proof gallons, is that correct?

A. That is correct. [39]

Q. Then after you got those figures you calculated the amount on hand, did you?

Mr. Fouke: I object to that as leading.

Mr. Guerard: All right, I will change it.

Q. Did you calculate the amount on hand?

A. I did.

Q. How did you make your calculation?

Mr. Fouke: Might I ask when, counsel?

Mr. Guerard: On December 28th.

A. The subtraction of the amount which had been gauged out from the amount that should have been produced from the calculated yield would give the figure of what should have been on hand on the conclusion of distilling on December 26th.

Q. You did make a calculation, did you?

A. I made the calculation.

Q. Do you remember what it was?

A. It approximately was 26 proof gallons more than the amount shown by the figures given me by Renteria.

Q. You figured that as lost by evaporation?

A. That would be probably the ordinary loss by evaporation.

Q. Then did you measure the diluted brandy? I am still speaking of December 28th; Did you measure the diluted brandy in the receiving tank

(Testimony of Arthur F. Bulfinch.)

and that which had collected in the distilling material sump? A. I did.

Q. Did you proof it? A. Yes.

Q. What did you find? [40]

Mr. Fouke: The same objection, there is no foundation laid for how or what method was used, or as to how he arrived at it.

Mr. Guerard: He said he calculated it.

Mr. Fouke: How?

Mr. Guerard: Will you explain just how you arrived at it, and whether you used a pencil and paper or ink, whatever you did; explain the mechanical procedure when you undertook to arrive at these figures for Mr. Fouke's benefit.

A. Each brandy tank is required by regulation to have stated thereon the capacity in wine gallons of the brandy-receiving tank. That capacity is tested by the Alcohol Tax Unit and from there that figure is accepted as the capacity of the tank. The tank being filled, the capacity in wine gallons was taken as shown by the marked capacity of the tank and the proof was determined by hydrometer and thermometer, making corrections for temperature.

Q. Right there, did you ascertain the proof?

A. We ascertained the proof of the spirits at the time.

Q. What proof did you arrive at?

A. The proof of the spirits of that tank I believe was around 55 at that time.

Q. Were you given any information by any agent, servant or employee of the winery as to the

(Testimony of Arthur F. Bulfinch.)

proof of the brandy in the tank prior to dilution from the overflow of water?

A. Mr. Renteria said in the presence of Mr. Groci that he had run the brandy [41] at 155 proof throughout the entire line, and that was the proof of the brandy before the overflow of water.

Q. Did you or did you not calculate the loss suffered by the winery by any sort of calculation?

A. The difference between the amount of brandy which was on hand before the loss was sustained and the quantity of brandy in both the brandy tank and in the sump would give the amount of the loss which had been sustained.

Q. What was the amount of the loss?

Mr. Fouke: I object to that as calling for the conclusion of the witness unless he states how the loss was sustained.

The Court: If he knows he may answer.

Mr. Guerard: Q. Did you calculate the loss?

A. I did.

Q. My question now is, the figure arrived at by reason of your process of calculation.

A. That was 1600 plus proof gallons.

Q. It was over 1600? A. Yes.

Q. Proof gallons?

A. Yes. 1619.56 proof gallons was the amount of loss that I determined at that time, and that is the same figure that was used.

Q. And it was upon those figures that you figured the amount to be charged the winery for tax purposes, is that correct?

(Testimony of Arthur F. Bulfinch.)

A. That is correct.

Q. Do you know whether or not the spirits that remained on hand were afterwards redistilled?

A. As far as I know they were. [42] Application was made to redistill them.

Q. You have no personal knowledge, but you do know an application was made to redistill?

A. Yes.

Q. You don't know whether they were, or not?

A. No.

Mr. Guerard: I think that is all right now.

Cross-Examination

Mr. Fouke: Q. Mr. Bulfinch, you stated that Mr. Renteria was an employee at the Livermore Winery. Will you tell us upon what basis that statement is made, as to how you know he was an employee?

A. On his own statement that he was the still operator.

Q. Made at what time and place?

A. Made on December 28th.

Q. Did he state that he was an employee of the Livermore Winery?

A. Not in so many words.

Q. Do you know whether he was an employee of some other party for whom spirits were being distilled under an arrangement or contract?

A. I have no knowledge of that.

Q. Would you say that he was not an employee of some concern at the time?

(Testimony of Arthur F. Bulfinch.)

A. There is no reason to think that he was.

Q. Do you know that he was not an employee of someone else at the time? A. No.

Q. You don't know whether he was an employee of the Livermore Winery at the time, of your own knowledge?

A. Merely from the statement he made.

Q. Of your own knowledge, will you just answer the question? [43]

A. There was apparent an employer and employee relation between Mr. Groci and him at the time they were together.

Mr. Fouke: I move that go out as not responsive.

The Court: Answer the question.

A. No, I don't.

Mr. Fouke: Q. You testified that you did not personally see this particular document, Form 15, but that the figures that are included there were furnished you and you observed them in writing, and they were furnished by Mr. Renteria, is that correct?

A. By Mr. Renteria or some other employee of the winery.

Q. Do you know what other employee it might have been? A. I don't know.

Q. Do you know whether it was some other employee?

A. These forms are generally kept in the office of the winery, and it would be necessary for the

(Testimony of Arthur F. Bulfinch.)

person to have access to that office to take that from the file and give it to me.

Q. But you personally saw these figures?

A. I saw the figures on the rough copy which is kept as a daily entry as required by the regulations.

Q. Do you know whether the rough entries were records of the Livermore Winery, or private records of an employee?

A. These are records of the Livermore Winery. As far as their preparation is concerned, they are required to keep that record and keep it accurately. They submit a transcript of [44] the record at the end of the month for Form 15, which you have there.

Q. Were they on any printed form of the Government?

A. They are on Form 15.

Q. Now, that some eight years have passed you still know that the figures that were contained on this report to which you have testified were those indicated to you at the time of your December 28th visit. Now, I would like to have you tell me, if you can, what appears in that sixth column on page 3 of this Form 15—what quantity in gallons appears on line 3.

A. I compared the totals of the form as to calculated yield and the amount of the brandy gauged out with the figures that I had in my report and found them to be identical. That is why I can testify to the fact that those figures were the same as the figures that I took off the rough entries at the time of the visit to the winery.

(Testimony of Arthur F. Bulfinch.)

Q. When did you make that comparison?

A. I made that comparison a week ago in the office of Mr. Guerard.

Q. Did you make it from the original records that you originally said were submitted to you at the winery with this Form 15?

A. I made it from a copy of my report of inspection on which I had written down the figures that were on the original form.

Q. When did you make that report of yours, at what time?

A. On December 30.

Q. Where did you make it?

A. In the office of the Alcohol Tax Unit. [45]

Q. And did you have at that time the copies of the Livermore Winery records or those of the employee where those figures were set forth?

A. I had my original notes on it.

Q. Do you have those original notes with you now?

A. I have not.

Q. Then you don't know whether or not those are the identical figures or the correct figures or accurate figures, do you?

A. I believe them to be.

Q. But of your own knowledge you don't know?

A. I have not looked at——

Q. (Interrupting) Just answer my question.

A. No.

Q. You don't know, is that your answer?

A. That is right.

Q. Where we have totals on the bottom of this

(Testimony of Arthur F. Bulfinch.)

form which gives certain figures, can you give me those totals from memory at this time?

A. Not at this time.

Q. It would be necessary for you to refer to other documents or records in order to be able to state what those amounts were?

A. To give the exact amount it would be.

Q. That is equally true with respect to your other testimony earlier as to the statement on the reverse side of this report as to the summary of brandy disposed of or on hand?

A. That would be equally true of that.

Q. So you don't know, then, what amount was set forth in those figures?

A. I know the approximate figures within a few gallons.

Q. Then would you give me the amount that is listed under [46] paragraph No. 8, entitled, "Casualty," and tell me how many proof gallons is listed under that? This is Form 15 of December, 1936.

A. I believe that figure is 2973.80.

Q. The figure here is 2873.70. Do you know what the total of the whole group covering the summary of brandy produced, disposed of, and on hand is?

A. That figure is approximately 4500, I could not give it exactly.

Q. In other words, you don't know the exact amount.

A. I don't know the exact amount.

Q. So that it would be necessary for you to

(Testimony of Arthur F. Bulfinch.)

refer to other documents or records in order to testify specifically as to those figures?

A. It would.

Q. Calling your attention to Plaintiff's Exhibit 1-B, I ask you whether or not you can state from your knowledge and memory the number of gallons that are listed under paragraph 8, "Casualty," as to brandy, the summary of brandy produced, disposed of and on hand?

A. The total amount produced?

Q. Well, the first amount occasioned from casualty?

A. What form?

Q. That is another copy of Form 15, Monthly Return of Fruit Distiller for December, 1936.

A. The amount shown as casualty in that form is 1,619.56 proof gallons.

Q. Can you state as to the quantity of brandy that was on hand as of the last of the month, paragraph No. 9, as to the number of gallons?

A. That was the figure that was recoverable, [47] 1200 plus proof gallons.

Q. The figures are different here. As to the quantity that was transferred to wineries under paragraph No. 7, do you know the number of gallons, can you testify to that?

A. 1602 and a small fraction.

Q. The figures are different here. Do you know of your own knowledge, Mr. Bulfinch, how much brandy was on hand at the Livermore Winery prior to December 26, 1936?

A. I cannot give you the exact figure on that.

(Testimony of Arthur F. Bulfinch.)

Q. You have testified here with regard to the fact that you made certain tests and gaugings and that the proof of the brandy that you tested and gauged ran at 55 proof. Are you positive or certain as to that amount? A. As to the proof?

Q. Yes, that you gauged on December 28, 1936.

A. I am certain that I gauged it. I would not say as to the exact proof.

The Court: He testified he believed it was.

A. I said that I believed it was 55 proof.

Mr. Fouke: Q. Isn't it a fact according to the records that you sent personally to the Internal Revenue Department that the proof of brandy contained in tank No. 2 was just 54 proof?

A. That might be.

Q. Isn't it a fact that you advised the Department, the Alcohol Tax Unit, that the proof of the brandy in tank No. 1 was 20 proof gallons?

Mr. Guerard: I object to the question because the best [48] evidence is the report.

Mr. Fouke: This is cross-examination and he has already testified as to the test he made and the fact that so far as those tests were concerned there was a certain proof. Now, I have information which indicates otherwise.

The Court: Have you a report?

Mr. Guerard: Yes, there is a report covering it.

The Court: Cross-examine him on that report and ask him if he made that report.

Mr. Fouke: Q. Did you make such a report to the Alcohol Tax Unit? A. Yes.

(Testimony of Arthur F. Bulfinch.)

Q. The proof of brandy varied in that test, depending upon where the material was tested and where it was located, is that not true?

A. Well, the bulk of it was in the brandy receiving tank No. 2, and that would be all the same proof, and then there was a small amount in that distilling material sump.

Q. How many sumps are there there?

A. I believe only one at that time.

Q. Only one sump?

A. Only one distilling material sump that I recall.

Q. Isn't it a fact that there were two concrete sumps at that time on the premises?

A. Not to my knowledge.

Q. Would you say that there was not sump No. 1 with a capacity of 225.10 gallons and sump No. 2 with a capacity of 422.59 [49] gallons on December 28, 1936?

A. I would not say that there were not two sumps.

Q. So there might have been?

A. There might have been two sumps, yes.

Q. When you made your tests did you make your test only of the receiving tanks 1 and 2 and of one of the two sumps? A. Yes.

Q. Did you make tests of any other material elsewhere in the premises, speaking of the distillery premises? A. No.

Q. In your observation of this still, was there one still on the premises at the time? or two stills?

(Testimony of Arthur F. Bulfinch.)

A. There was one still on the premises at that time.

Q. In the process of manufacture of distilled spirits would you please explain the process of manufacture, inasmuch as you have been permitted to testify as to the still and its operation.

A. How much do you want on that?

Q. I would like to have you state the manner in which the distilling material is received and the course.

A. The still material in the case of bonded winery No. 2 is received by pipe line and deposited in the stilling machinery. The distilling material then flows directly over into the tank or is pumped to a charging tank located high in the building, where it would flow by gravity into the still column entering through the upper portion of the still. The steam is applied to the bottom of the still, the vapors rise through the rectifying [50] column, that is above the point of entry of the still material, and go out through the top of the still; what is called the vapor pipe is about six inches or eight inches in diameter. This vapor pipe goes into the dephlegmator, which separates the low proof spirits with a comparatively low boiling point as compared with a high boiling point. These are returned to the still for further distillation. Then the vapors which have not been condensed by the dephlegmator flow into the condensor, where they are condensed and flow through the tribox. From the tribox—the tribox is located on the control floor of the dis-

(Testimony of Arthur F. Bulfinch.)

tillery—connected with that is a pipe by which the brandy may be turned over into a singling tank or into the brandy receiving tank.

Q. What is a singling tank?

A. The singling tank in most distilleries is a small tank in which they collect spirits that are below the proof intended to be stilled.

Q. Where was that singling tank located in the Livermore Winery, in the distillery?

A. I don't recall where that was located, now.

Q. Do you recall whether it was located at the top of the still, itself? A. It would be below.

Q. It would be below the still?

A. Below the top of the still.

Q. How far below the top of the still?

A. Ordinarily it is located just below the level of the tribox.

Q. As to the overflow tank, do you know where that is located? [51]

A. There is no overflow tank. The tribox is equipped so that the overflow will go over to a singling tank or to the brandy-receiving tanks, one of the brandy-receiving tanks.

Q. Then you do not recall in the Livermore Winery the presence of an overflow tank of 398.34 gallons capacity? A. I do not recall that.

Q. Do you recall another overflow tank, a puncheon made of oak wood of about 180 gallons capacity? A. No.

Q. If there were such a tank on the premises it would be a distilling material overflow tank, so that

(Testimony of Arthur F. Bulfinch.)

any distilling material would go into that tank and be retained until released from that tank?

A. I don't recall such a tank, at all. Ordinarily, the overflow from the discharge tank goes back into the stilling material, itself.

Q. Is there in addition to that a singling tank with a capacity of 104 gallons, known as singling tank No. 1?

A. I believe there is.

Q. In your computation as to the quantity of distilled spirits that were allegedly lost on December 26th or December 27th, as to which you made a computation on December 28th, did you include in your computation any distilling material or any brandy that might have been contained in the overflow tank No. 1, having a capacity of 398.34 gallons, the so-called overflow tank having a capacity of 180 gallons and the singling tank having a capacity of 104 gallons?

A. The distilling material [52] tank would not be relevant because the amount of the loss was calculated on the quantity which the distilling records showed to be in the tank before the loss and the quantity which remained on hand in the tanks which were measured.

Mr. Fouke: I move that the answer be stricken out as not responsive to the question. I would like an answer to the question. I would like to have the question read.

(Question read by the reporter.)

A. No.

Q. Did you take into your consideration of any

(Testimony of Arthur F. Bulfinch.)

loss any distilled spirits on the floor of the distillery, as distinguished from the sump or the receiving tank?

A. There was no distilled spirits mixed with any substance in any recognizable quantity on the floor at the time of my visit, and there was none taken into consideration.

Q. Do you recall what kind of a floor there was in the distillery premises on December 28th when you visited the premises?

A. Well, there was a cement floor; a concrete floor around the sump.

Q. What kind of a floor was the floor of the distillery, if you know?

A. It was a concrete floor in and around the sump.

Q. Isn't it a fact that a portion of the distillery premises contained a ground floor, a dirt floor?

A. Yes.

Q. Did it? A. Part of it.

Q. Was that area damp at the time you were there on December [53] 28th?

A. As I recall, it was.

Q. Was there any observable distilled spirits or other material there when you were there on December 28th?

A. No measurable quantity of it. It was wet there from a quantity that had overflowed.

Q. Did you observe any distilled material outside of the still house or distillery premises on that day? A. There was some outside.

(Testimony of Arthur F. Bulfinch.)

Q. On December 8th?

A. A negligible quantity. There was wetness on the ground outside of the brandy-receiving tank or the room containing the brandy-receiving tank.

The Court: That would not go in the sump, then?

A. That would run out in the opposite direction.

Q. (By Mr. Fouke): Did you make a test to determine whether or not there was any brandy in that? A. No, I did not.

Q. Did anyone else, to your knowledge, make any test to determine if there was any brandy there? A. No.

Q. No test at all? A. No.

Q. So far as you know, the only tests you made were those of the sump which you believed to be but one sump, and two receiving tanks?

A. That was the only sump containing liquid. I made a check of that, and the two receiving tanks.

Q. But you have not any present recollection of a second sump, nor of the distilling material overflow tank, nor of the puncheon or the singling tank?

A. They were not pertinent to the loss. [54]

Q. I mean you made no check?

A. I made no check.

Q. You said that you were at the winery on December 28th. A. Yes.

Q. You are positive as to that date, are you?

A. I am.

Q. And not that it was on December 27th when you were there?

(Testimony of Arthur F. Bulfinch.)

A. December 27th was a Sunday and I was not there on that day.

Q. You said that you are positive that Mr. Groci was at the winery on December 28th. A. Yes.

Q. At what hour?

A. As I recall, it was shortly after noon when he came there.

Q. Shortly afternoon on December 28th?

A. Yes.

Q. You have indicated that Mr. Renteria was in charge of the still. If so, do you know during what hours he was there, of your own knowledge?

Mr. Guerard: What day?

Mr. Fouke: On December 26th, 1936.

A. He was there on that date—it would not be from my knowledge but from his statement.

Q. I say from your own knowledge.

A. I have no knowledge of the hours he was there.

Q. I repeat the same question as to December 27th. A. No knowledge.

Q. And as to December 28th I repeat the same question.

A. He was there to my own knowledge from about ten or ten thirty in the morning until sometime in the afternoon, when I left the premises. [55]

Q. Isn't it a fact that another individual by the name of Douglas Kennedy was in charge of the still up to four o'clock p. m. of each day, of your own knowledge? A. Not to my knowledge.

Q. Well, was he there?

(Testimony of Arthur F. Bulfinch.)

A. I don't recall his being there that day.

Q. You don't recall it?

A. I don't recall his being there on that day.

Q. Would you say he was not there?

A. No.

Q. Do you recall anyone else being present on December 28th?

A. Mr. Browning and Mr. Groci, and there undoubtedly were other employees around the premises, I didn't know by name at that time.

Q. Did you see any person turn on any faucet in the premises on either December 26th, 27th, or 28th, 1936?

A. What premises?

Q. In the distillery premises.

A. In the distillery premises I couldn't recall seeing anyone do so.

Q. You were not personally present during such period of time as there might have been any flow of water or distilling material or brandy from the still into the receiving tank on either of those days, were you?

A. No.

Q. So that the only information you have is what had been told you by others other than what you testified to of your own knowledge?

A. That is correct.

Q. Do you know how long the still was in operation, if at all, on December 26, 1936?

A. I have no idea of the time, at all, [56] except the closing-down time as it was given to me by Mr. Renteria.

Q. Do you know who was in charge of the still

(Testimony of Arthur F. Bulfinch.)

on that day, or what persons were in charge of the still on that day?

A. Renteria said that he had been in charge of it during the night shift. Whether that started at four o'clock I don't know.

Q. Did he state whether or not he was in charge of it during that morning shift, or up to four o'clock? A. No, he did not.

Q. Do you know whether anyone else was in charge up to that time? A. I do not.

Q. So that any statements that might have been made by Mr. Renteria were statements relating to the time when he was operating the still, as to how much may have been produced out of the distilling material? A. That is correct.

Q. So you have no personal knowledge of what quantity of distilling material was distilled during any other portion of the day? A. No.

Q. By any other person? A. No.

Q. Then how can you determine the quantity of proof gallons of brandy that was supposed to have been manufactured or produced there on December 26th?

A. I did not determine the amount that was produced on December 26th. My determination was made from finding out the amount of brandy that was on hand on December 26th, which was taken from the reading at the time [57] that Renteria discontinued distilling. The amount of brandy that was in there might have been distilled during any part of the month.

(Testimony of Arthur F. Bulfinch.)

Q. Any portion of the month? A. Yes.

Q. Then is it your testimony that any loss, if any, occurred on December 27, 1936?

A. Not necessarily. The loss that occurred was between the time he discontinued the distilling on the night of December 26th until the time that the loss was discovered and the water turned off on December 27th.

Q. But you have testified that Mr. Renteria, to your knowledge, was on the night shift from four to twelve, is that not correct?

Mr. Guerard: He has not testified to that, at all. He stated that is what Renteria said to him.

Mr. Fouke: Then I withdraw the question.

Q. You testified that Mr. Renteria told you he was on the night shift? A. Yes.

Q. What time was it customary to close down the night shift?

A. On Saturday night at 12 o'clock.

Q. Is that not the law, to your knowledge, in connection with your duties? A. Yes.

Q. It is mandatory that it be closed at twelve o'clock? A. Yes.

Q. On the night in question, prior to Sunday morning? A. Yes.

Q. Do you know the capacity of the still that was being used in [58] the distillery at that time?

A. I do not.

Q. Would you be able to state about how long it would take for a still of the size that was there

(Testimony of Arthur F. Bulfinch.)

to fill with water to a point where it might overflow from the tribox into the receiving tank?

Mr. Guerard: I object to the question as entirely speculative, what might happened.

The Court: Have you any knowledge on that?

A. That is an impossible question, because you have no idea how big the water line is you put on there, about how many gallons of water was flowing in.

Mr. Fouke: Q. Would you be able to make any statement at all as to how long it would take if there was a minimum supply of water inserted into the tank?

A. A minimum supply might be a drop at a time.

The Court: You are asking him about a minimum. What might happen on a minimum is very indefinite.

Mr. Fouke: I will withdraw the question and reverse it.

Q. Did you observe any hose on the premises on December 28th?

A. I don't recall that I did.

Q. Did you observe it on any other day that you were there?

A. I did not distinctly recall any hose—there was a hose that was used from time to time, I believe.

Q. What was the size of that hose?

A. Either inch and a half or two inch. That was in the winery. [59]

(Testimony of Arthur F. Bulfinch.)

Q. How long would it take, in your opinion, if a full force of water were permitted to flow into the still, itself, so as to cause the water to go in through the tribox of the still?

A. I have no definite knowledge on that, at all. It would be based entirely on the flow of water, the diameter of the still, the height of the entire column, the height of the feeder line, and there would be so many factors in there, I could not possibly answer the length of time.

Q. Do you know whether the still was operated or whether the still was closed down prior to twelve o'clock on December 26th?

A. From statements made it was closed down a very short time before that.

Q. Then in that short period of time would it have been possible for the tank, that is, the still, to have been filled with water so as to cause it to overflow into the tribox and receiving tank?

A. I don't know.

Q. You are qualified as an expert, apparently; what is your opinion on it?

A. I would believe it unlikely that it would fill up in that time.

Q. Then directing your attention to December 27, do you know what portion of the alleged loss was sustained on December 27, if any?

A. I would say most of it was sustained on that day.

Q. Was it sustained on any other day after that day?

A. No, it was not.

(Testimony of Arthur F. Bulfinch.)

Q. Well, do you know?

A. The condition that caused the loss [60] had been stopped at something like 9:30 on Sunday morning; that would be the 27th, and there would be no reason for any loss after that hour.

Q. So far as you know, you don't know, do you?

A. I don't know.

Q. There might have been a loss on the morning of December 28th, before you got there, might there not?

Mr. Guerard: I object to the question as speculative.

Mr. Fouke: I withdraw the question.

Q. Then so far as you know any loss that was occasioned at all, if any, occurred prior to the time that you arrived there on December 28, 1936?

A. That is correct.

Q. Your figures were computed at or about what hour?

A. At or about noon I would say.

Q. At or about noon? A. Yes.

Q. That is of that day?

A. It might be just before the noon hour.

The Court: We will take a recess now until tomorrow morning.

(An adjournment was thereupon taken until tomorrow, Wednesday, December 20, 1944, at 10:00 o'clock a. m.) [61]

Wednesday, December 20, 1944

10:00 A. M.

ARTHUR F. BULFINCH,

recalled;

Cross-Examination

(Resumed)

Mr. Fouke: Q. Mr. Bulfinch, you have testified that you were familiar with the distillery premises of the Livermore Winery. Is that correct?

A. I do not think I said I was entirely familiar with the distilling premises. I was not familiar with the winery and distillery, and so far as I know that was no more than the second time I visited the premises.

Q. You testified with regard to the still, itself, and its operation, and what in your opinion could have occurred in connection with any loss that was sustained, is that not true?

A. That was based on a general knowledge of stills rather than a particular knowledge of the Livermore Winery still.

Q. Directing your attention to the distillery on the premises of the Livermore Winery, what is your present recollection as to whether or not there were other tanks than those to which you have testified and those to which your attention was called during the course of the cross-examination yesterday?

A. There were two distilling measuring tanks,

(Testimony of Arthur F. Bulfinch.)

large wooden tanks of some eight thousand gallons capacity.

Q. In connection with your tabulation or your computations to which you testified, did you measure the quantity of the distilling material in those tanks in arriving at your conclusion? [62]

A. Would it be permissible for me to correct something I said yesterday?

Q. First, let us get an answer to this question. If you can, answer the question, please.

A. There was no distilling material in the tanks; there was a mixture of brandy and water which had been in the sump or sumps, and on the floor of the distillery, which had been transferred to the distilling material tank No. 1 and was measured. At the time you asked me the question as to measuring the sumps, the number of sumps yesterday, you recall that you said that I reported measuring one sump, and I asked you if that was my report that you had and you said that I so reported in that report. On the basis of that statement I inadvertently made the statement that I measured it in the sump rather than in the distilling material tank No. 1, which is the statement which is made in my report.

Mr. Fouke: If your Honor please, in connection with that report I have a letter from Frank J. Hennessy, United States Attorney, quoting portions of the report by Mr. Bulfinch. Mr. Guerard, will you stipulate that this is a correct copy?

Mr. Guerard: I will stipulate that the portions

(Testimony of Arthur F. Bulfinch.)

of the report quoted in the letter from the United States Attorney, dated August 24, 1943, is from a report made by Mr. Bulfinch, dated December 30, 1936.

Mr. Fouke: Q. Now, then, again directing your attention to this report which is the basis of the question that I asked [63] you in what connection do you wish to vary your testimony or correct it?

A. On the statement that one sump was measured. This figure is the recovery from the sump and stored on the distilling material tank No. 1 and it was measured there.

Q. Did you obtain that material from more than one sump?

A. From one sump. There are two sumps separated by a concrete wall with an inter-connecting pipe-line. The only division between the two sumps is a concrete wall 46 inches, so that the material placed in the smaller sump, which is at a higher level than the other sump, will flow down so that there would be in effect one sump.

Q. Do you have those plans here?

A. I have not.

Q. Will you produce them?

A. I can produce them; they are at the office.

Q. Could they be brought over here?

A. I think some one could bring them over here.

Mr. Fouke: Might I call for a recess while they are brought over here?

Mr. Guerard: He is asking an employee for the Government if he can produce something that

(Testimony of Arthur F. Bulfinch.)

is not in his custody or control. I will state to your Honor I had the plans here yesterday, and as the case progressed I saw no need for the plans being used in the trial of this case, and I dismissed the witness, and along with his dismissal I told him to take the plans along with him, that I would not have any use for them. [64]

The Court: Proceed with this witness.

Mr. Fouke: Might I make a statement? The witness has just testified that he had seen the plans since the time he was here yesterday, and in connection with that I would like to verify the information from the plans, which are not in our possession. I would like to have those plans made available to which the witness has testified, in order that we might be able to either establish or contradict the information which he has just testified to.

The Court: There is nothing before the court. Proceed with this witness.

Mr. Fouke: Q. Now, in connection with the plan, I will ask you if you did not say there were two distilling material receiving tanks?

A. Distilling material measuring tanks.

Q. And as to those two tanks was the distilling material poured into those tanks and from there into the still in the process of distillation?

A. All the material entered into the still by pipe-line from the winery, and from there went into the sump.

Q. And in connection with the quantity in those

(Testimony of Arthur F. Bulfinch.)

tanks, were there gauges or measures on the tanks from which there could be ascertained the quantity of distilling material therein?

A. There was a gauge on each of the tanks.

Q. And in connection with those gauges it is possible to ascertain and determine the quantity of distilling material in the tanks at all times, isn't it?

A. That is correct. [65]

Q. That was part of the records of the winery, indicating the quantity that was there?

A. They did not carry records indicating what was there. The records indicated what went into the tanks from the winery and was used for distillation.

Q. Did you, in arriving at your computation, measure the material in both tanks, or just one of the two distilling material tanks?

A. There was material only in one.

Q. Did you measure the other tank?

A. Yes.

Q. Did you make a gauge, yourself, of the other tanks?

A. The tank was empty.

Q. The other tank was empty? A. Yes.

Q. Now, then, as to the removal of the distilled spirits from the winery premises, do you know the method of that removal and can you state it at this time?

A. At that time the winery had a fortifying room located on the other side of the road, and it was transferred by pipe-line into the fortifying room, and into the fortifying tank.

(Testimony of Arthur F. Bulfinch.)

Q. That was a separate room and establishment apart from the distillery?

A. It was part of the winery premises.

Q. But it was separate from the distillery, itself?

A. Yes.

Q. And on the two receiving tanks for the brandy to which you testified as to the overflow, are there any locks or padlocks on those tanks?

A. The outlet valves were locked. The manhole at the top of the tank is locked with Government locks.

Q. In whose possession were the locks on this occasion? [66]

Mr. Guerard: If he knows.

Mr. Fouke: If you know.

A. They are in the possession of the gauger assigned to the plant. Mr. Browning was assigned, and I presume they were in his possession, but I could not say definitely.

Q. Are there any keys made available to the winery manager or distiller?

A. No.

Q. The Government has all of the keys to the outlets to the tanks, is that right?

A. Yes.

Q. Now, was there on the winery premises, if you know, a distillery warehouse?

A. They did have one, that was located just back of the fortifying room.

Q. And in the event any brandy was removed from the distillery to the warehouse it would have to be removed from the distillery, itself, and into the distillery warehouse?

(Testimony of Arthur F. Bulfinch.)

A. The distillery warehouse I think was part of the distillery premises, and it would be removed from the proof distillery to the Internal Revenue bonded warehouse.

Q. A separate premises under lock and key?

A. Yes.

Q. Under the care of a bonded storekeeper, a Government official?

A. The same gauger would look after that.

Q. You said you looked at these plans. Did you observe whether there was a faucet on the distilling material line connecting to the distillery?

A. I did not observe that.

Q. Did you observe whether there was a faucet on that particular [67] line?

A. I don't recall that it was shown on the plans.

Q. Isn't it a requirement, if you know, that in setting up a fruit distillery it is necessary and a prerequisite that the plans be approved by the Alcohol Tax Unit of the United States Government prior to authorizing one to engage in the distillery business?

A. That is correct.

Q. And any variation in these plans and in the physical equipment must be approved by the official in charge of that branch of the Federal Government, is that not correct?

A. It should be approved by the gauger assigned to the plant.

Q. By the gauger assigned to the plant?

A. Yes.

(Testimony of Arthur F. Bulfinch.)

Q. Then new plans are prepared to cover those changes?

A. They are not prepared for minor changes.

Q. Do you know of your own knowledge whether there was ever approval sought and obtained for the installation of a faucet in the distilling material line?

A. No, I do not.

Mr. Fouke: No further questions.

Redirect Examination

Mr. Guerard: Q. You testified that when you visited the plant on December 28th that you interviewed one Joe Renteria; is that correct?

A. Yes.

Q. Did he tell you the nature of his employment?

A. He said he was the night still operator.

Q. He said he was the night still operator?

A. Yes.

Q. On the same occasion you testified that you met Mr. Groci. [68]

A. Yes.

Q. Did he state to you what his position was with the winery?

A. He was vice-president.

Q. In one of the exhibits on file in the case Mr. G. B. Antonini signed certain papers as president in your presence, is that correct?

A. That is correct.

Q. What did he state with respect to his position with the winery?

A. At the office of Mayhew & Company he was introduced to me as the president of the company,

(Testimony of Arthur F. Bulfinch.)

and he signed the papers as president and swore to them.

Q. To your personal knowledge, you don't know the occupations of these various persons, do you?

A. No.

Q. You base your statement upon the claims made by those particular persons, do you?

A. Yes.

Mr. Fouke: I object to the questions as leading.

The Court: The objection will be sustained.

Mr. Guerard: Q. Upon what ground did you make the statement that Joe Renteria was night still operator and Mr. G. Groci was vice president, and Mr. G. B. Antonini was president of the Livermore Winery, Inc.?

Mr. Fouke: I object to that as calling for the conclusion of the witness.

The Court: He may answer.

A. The position of Joe Renteria was established to my satisfaction by his statement and by the statement of Mr. Browning, [69] who was the gauger at the premises, who said he had seen Mr. Renteria there for the period of his assignment. The position of Mr. Groci was based on his statement, and there was the further fact that I made an inspection of the bonded winery in February of 1936 and at that time Mr. Groci also said he was vice president, and Mr. Antonini, as I said, was introduced to me at the office of Mayhew & Company as the president of the winery and signed the document as president.

(Testimony of Arthur F. Bulfinch.)

Q. Now, in all of your investigations, whether based upon the information given to you by Mr. Antonini and Mr. Groci as to the amount on hand prior or up to midnight of December 26, you used, did you, the records in estimating the amount of the loss?

A. The amount of the actual loss on which the assessment was based was taken from the records of the still operator as to the amount that was on hand, less the amount which we found on hand at the time of the inspection. The other calculation as to the calculated yield from the distilling material and the amount removed, leaving the balance that should be on hand, was a figure that was arrived at by comparison in order to determine that the figures given to me were reasonable. The assessment is based on the amount that was shown on hand by the records at that time.

Q. That indicated a net loss of 1619.56 wine gallons as being taxable?

A. Proof gallons.

Q. Proof gallons as being taxable?

A. That is correct. [70]

Mr. Guerard: No further questions. If your Honor please, that completes the Government's case, with the exception that I have drawn a stipulation—I have not had a chance to read it, I dictated it this morning—with respect to the testimony of Mr. Browning. I was not able to get it yesterday on account of a matter that arose in my office and could not get any stenographic help until this morn-

ing. I now present it to you, Mr. Fouke, to see if we can agree upon it. I would state, if your Honor please, that it is based entirely upon information which Mr. Browning furnished some time ago, and every statement contained in this stipulation is in Mr. Fouke's possession.

Mr. Fouke: Of course, that is not a matter of record at the present time, and it is not admitted in evidence, that is just arguing the case.

Mr. Guerard: Might I suggest a recess in order to enable him to read this?

Mr. Fouke: We could not stipulate to this, because it states a lot of things that we, ourselves, do not know, and we question the accuracy of the statements made.

Mr. Guerard: I do not see how counsel can reach that conclusion, when he has not even read it.

Mr. Fouke: I have already read part of it.

Mr. Guerard: I suggest that the matter be left open, and I think the proof to be submitted by the defendant will fairly substantiate every statement that is made and included [71] in this stipulation.

The Court: He won't enter into the stipulation, so what is the next step?

Mr. Guerard: It puts us in an embarrassing position, because, as I explained to you yesterday, the witness, Mr. Browning, had a heart attack in my office and he is not available as a witness for the Government. As a matter of fact, the statements contained in this stipulation have already been testified to by Mr. Bulfinch, and this stipula-

tion is nothing more than a corroboration of the testimony which has already been given.

The Court: He won't enter into the stipulation. That is the answer to that.

Mr. Guerard: Of course, it is simply corroborative evidence.

Mr. Fouke: I have read enough of it now to say that I could not enter into this type of stipulation; if it is only corroborative evidence, which it does not appear to me to be, that is one thing. We can stipulate if Mr. Browning were here he would testify to the same effect in so far as he was present, as Mr. Bulfinch has testified.

Mr. Guerard: If the stipulation is to the effect that if Mr. Browning were present he would testify to the same facts that Mr. Bulfinch has testified to, that is satisfactory to me. [72]

Mr. Fouke: If Mr. Browning were present, but if he was not present at the time these statements are alleged to have been made then, of course, we would not consent to this stipulation.

Mr. Guerard: You will stipulate only to what occurred on December 28th?

Mr. Fouke: That is right.

Mr. Guerard: As shown by the testimony of Mr. Bulfinch?

Mr. Fouke: Yes.

Mr. Guerard: We agree to that stipulation, if your Honor please, and the plaintiff now rests.

Mr. Fouke: That is with the understanding that it is subject to any of our motions to strike; in other words——

Mr. Guerard: That is right.

Mr. Fouke: Now, if your Honor please, I would like at this time to make a motion for judgment in favor of the defendants. Before making that motion I would like to make a motion to strike out the following exhibits of the plaintiff for the reasons presented at the time that they were offered in evidence.

As to Plaintiff's Exhibit No. 1, that it does not appear thereon nor therefrom that the individual designated as G. B. Antonini was the president of the winery, namely, Livermore Winery, Inc., on that date, in that where the signature for president is supposed to have been indicated no signature appears at this particular point, and in verification it does [73] not indicate that Mr. Antonini signed it as President of the Livermore Winery, Inc., hence not binding upon that defendant, nor upon Saint Paul Mercury Indemnity Company. On the further ground there has been no foundation laid to establish that this was filed for or on behalf of the Livermore Winery, Inc. I think your Honor may want to rule on each one separately.

The Court: The motion will be denied at this time. All of these motions may be renewed after the submission of the case.

Mr. Fouke: Then there is no need of going on with a statement with regard to this.

The Court: No, just so you have your record.

Mr. Fouke: Then I would like at this time to renew my motion for judgment in favor of the defendants Saint Paul Mercury Indemnity Company

of Saint Paul, a Delaware corporation, and Livermore Winery, Inc., a California corporation, on the ground that plaintiff has failed to introduce evidence in accordance with or to prove the allegations contained in either the first or second cause of action to the extent that these allegations have been denied by those defendants.

In particular, I would like to call your Honor's attention to the fact that under paragraph 4 on page 2 of the complaint the then-existing statute is set forth covering the question as to the time for the payment of any tax which may have attached in connection with distilled spirits.

First, I might point out to your Honor that under the law [74] at the time of the manufacture of distilled spirits a tax attaches but does not become due or payable unless and until that particular material is either on the one hand assessed after having been gauged and proofed, and then, secondly, removed from the premises where the material was distilled.

As I pointed out, there was another remedy available to the plaintiff, if they had seen fit to have proceeded, namely, to have endeavored to ascertain and to have made an arbitrary assessment based upon the quantity of distilling material that might have been brought to the respective tanks and to the distillery premises, and then to have proceeded in order to effect the collection of the tax. The procedure that plaintiff has elected to follow is one of two alternatives. In this instance it is one where the spirits allegedly were removed to a

place that is not bonded. Had they been removed to the distillery warehouse that would have been a bonded warehouse and it would not have been necessary to pay the tax until the expiration of or on or about before eight years from that date.

Mr. Guerard: Might I make this interpolation? In the amended answer as filed, in paragraph 6 thereof, you admit the allegations of paragraph 4.

Mr. Fouke: I am not denying the allegation. As a matter of fact, I am relying upon that allegation and other allegations which were admitted as the basis for this motion for judgment in favor of the defendants. I quote from paragraph 4 of the [75] complaint, commencing with line 5, page 3. This is from section 1150, Title 26, United States Code, 1934 Edition:

“(b) Time for payment; bonded distilled spirits; distilled spirits not bonded. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the Collector, who shall immediately demand payment of such tax and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law. Revised Statutes, section 3253.”

Now, to proceed further, the allegation is made under paragraph 5, which has been denied as to the quantity of distilled spirits alleged to have been distilled in a particular month as to which your Honor heard the evidence and the testimony as to the failure to include in the computation in arriving at this figure distilling material in overflow tanks having a substantial number of gallons capacity in arriving at the calculation in question. It is our position that it was incumbent upon the Government to establish the fact, first, that a tax had assessed and to establish the method and the form of [76] arriving at that tax, and then a compliance with the regulations and rules and laws relative thereto as to the imposition and assessment of that tax and the efforts made in connection with the collection of that tax, all of which it is our position has not been set forth nor established so far as the testimony that has been introduced.

Then the more crucial point, if your Honor please, in paragraph 6 of the complaint. The complaint alleges without specifying the exact date that on December 26th and 27th the Livermore Winery removed from the premises the same quantity of the distilled spirits and that the tax thereon fixed by this section became due and payable, and mind you, not until there had been a removal from it, and then we hear testimony to the effect that there was no distilled spirits removed from the premises. As a matter of fact, this is the gist of their cause of action, that it had been removed, and

in the examination of the witnesses they have indicated, that is the one that testified, did not observe any removal of the distilled spirits, and that that which he gauged and checked on was only that within the distillery premises, itself. There is no evidence to support the allegation, in my opinion, here, and none that has been introduced so far as I could at this time recall indicating wherein any distilled spirits so alleged to have been removed in any quantity whatever has been removed from the premises. Moreover, the testimony was that so far [77] as the manufacture is concerned that probably there was no action on December 27th and as a matter of fact if the loss occurred by reason of the closing down of the still at or around 12 o'clock, that any loss would have been suffered on the 27th rather than on the 26th of December, 1936.

They have alleged in paragraph 7 that in compliance with law they levied and assessed against the defendant this tax, and yet we have no information, no evidence introduced indicating the method of procedure that has been followed. All that we have is an exhibit that was introduced to the effect that there was mailed to the Livermore Winery at Livermore, California, the notice and demand for tax, and also a notice and demand for a payment without any evidence it was mailed within the statutory period, the number of days that is required in connection with that notice; hence there has not been a compliance with the law in so far as that is concerned.

Then we have attached under that paragraph as an exhibit to the complaint an alleged notice which is admitted of May 25, 1939, making demand upon Livermore Winery and the Saint Paul Mercury Indemnity Company. That, incidentally, has been introduced in evidence here as Plaintiff's Exhibit No. 3, in which the same information appears. Hence, it is our contention that there was not a notice as required or any compliance with the law advising the Saint Paul Mercury Indemnity of the amount of its liability, if any, as surety under the bond which [78] was admitted, and consequently we believe that as a surety they are entitled to be notified as to what liability they might expect, and what, under those circumstances, they must meet and be able to establish, all of which was incumbent upon the plaintiff to establish.

We have denied both specifically and generally that there was any sum of money that was owing to the Government. And under the decision of *United States v. Freeman*, 157 Fed. 195, it has been held that it is sufficient defense on the part of the defendant to merely deny that they were not indebted in any sum whatever in connection with that which was sued upon, and that the Government has the burden of proof of establishing the tax, if any, and how it was arrived at.

Now, it is because of those facts we are asking that there be a judgment in favor of the defendants.

The Court: I am going to deny all of these motions at this time, with this thought in mind; you

may renew them at the close of the case, so that you do not lose any of your rights.

Mr. Guerard: Your Honor does not want me to go on with the argument of the case?

The Court: No.

Mr. Fouke: At this time I would like to call Mr. Antonini. [79]

G. B. ANTONINI,

called as a witness for defendants; sworn.

The Clerk: Q. Will you state your name to the court, please?

A. G. B. Antonini.

Mr. Fouke: Q. Where do you reside, Mr. Antonini?

A. 798 Green Street, San Francisco.

Q. Were you residing there on December 30, 1936? A. Yes.

Q. I hand you what purports to be a letter, referring to Plaintiff's Exhibit No. 4, purporting to bear your signature, dated December 30, 1936, and addressed to the District Supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, and ask you whether or not this is your signature, or a reproduction of your signature.

A. That is my signature.

Q. That is your signature? A. Yes.

Q. Will you tell me at what time and place your signature was affixed to the original of this document?

(Testimony of G. B. Antonini.)

A. I think it was in Mayhew's office.

Q. In whose office?

A. Mayhew's office.

Q. Where was that?

A. I don't know the number, it was on Market Street.

Q. In what city? A. San Francisco.

Q. Do you know who else was there on that occasion?

A. There was somebody else there, I don't recall now, I could not tell you who was there.

Q. Have you any recollection as to how many people were there? [80]

A. I know there were two or three parties there, I couldn't remember who it was. I know Mr. Mayhew was there.

Q. Do you recognize anybody in the courtroom as having been present on that occasion?

A. I don't know.

Q. Do you recall whether this gentleman—would you please stand up, Mr. Bulfinch—do you recall this gentleman being present on that occasion?

A. I may be mistaken, but I don't think I ever seen him; I don't remember ever seeing him before.

Mr. Guerard: Let the record show that the witness who stood up was Mr. Bulfinch, who has heretofore testified.

Mr. Fouke: Q. Now, then, directing your attention to the contents of this letter, which I would like to have you examine, were you on that date

(Testimony of G. B. Antonini.)

familiar with the facts that are set forth in that letter? A. I was not.

Q. Can you give any explanation as to this information and how it was placed in this document?

A. Well, I don't remember. I was in Mayhew's office and that was made up, on Market Street, but I was not familiar with that, because I was not on the premises, I didn't know anything about it.

Q. You say you were not on the premises. Were you engaged in other business? A. Yes.

Q. What business were you engaged in on December 26, 1936, other than President of the Livermore Winery?

A. You mean outside of that?

Q. Yes.

A. I was in the garage business. [81]

Q. How much of your time was devoted to each business?

A. Well, I would go from one place to the other.

Q. About what proportion, 50 per cent in each, or 10 per cent in one place, or 20 per cent?

A. I would put in some time in one place and some time in the other.

Q. Where did you put in your time as to the Livermore Winery?

A. Well, in the San Francisco office.

Q. Where was the office of the Livermore Winery at that time?

A. Broadway Street between Kearny and Montgomery.

(Testimony of G. B. Antonini.)

Q. It was not located on another street on that occasion, on Clay and Fillmore?

A. Well, I was not connected with the firm at that time, at all.

Q. So that on December 30, 1936, the office of the Livermore Winery was on Broadway?

A. Broadway.

Q. On Broadway Street in San Francisco?

A. Yes.

Q. It was not at the corner of Clay and Fillmore?

A. No, I don't know anything about that, because I was not connected with it then.

Q. In connection with your duties with the Livermore Winery, were they in San Francisco or elsewhere?

A. When I was connected with the Livermore Winery I was in San Francisco; the winery was in Livermore. The main office was in San Francisco.

Q. What particular duties with respect to the Livermore Winery did you handle and where?

A. San Francisco.

Q. What did you do?

A. I signed different papers for the [82] corporation.

Q. On December 26, 1936, were you in Livermore, California? A. No.

Q. Were you in Livermore on December 27, 1936? A. No.

Q. Or December 28, 1936?

A. I don't think so.

(Testimony of G. B. Antonini.)

Q. Or December 29, 1936?

A. No, I was not there at that time, at all. I know I was not there those days. It is so long ago I don't remember what days I was there, but I know I was not there those days, I was in the City.

Q. You knew you were in the City?

A. I was in the City.

Q. According to this letter it says, "At 11:50 p.m. Saturday, December 26, 1936, the distiller, Joe Renteria, attached a warehouse hose to valve into the distilling material pipe-line leading to top tank and turned on water, the purpose being to flush out pipes and column through the slop line. The distiller neglected to open the valve, and if such had been done the water would have passed through the still discharging through slop line. The water was turned off by an employee at the plant at 9:15 a.m. Sunday morning, December 27, 1936. It was then discovered that the oversight on the part of the distiller in not opening the slop line valve caused the water to run through the still and overflow brandy receiving tank No. 2, which was in use at that time, and which held approximately 1854 gallons of brandy at 155 proof, or 2673.70 proof gallons. Receiving tank No. 1 was not in use and was found [83] half full of water."

Did you make that statement on that occasion?

A. I made no statement of that at all because I didn't know. I must have got that in Mayhew's office from some person, I don't know who it was.

(Testimony of G. B. Antonini.)

We had some discussion there, and then Mr. Mayhew gave me something to sign.

Q. Do you know Joe Renteria?

A. I may have known him at that time because he was up there, but if I saw him now I don't think I would recognize him.

Q. Did you have any discussion with Joe Renteria between December 26 and December 30, 1936?

A. I didn't see him at that time, I never seen him.

Q. Did you have any discussion with him?

A. No.

Q. You never talked with him?

A. Never talked with him.

Q. Then you don't know of your own knowledge that these statements are true as to what the distiller Joe Renteria may have done on that particular day, December 26, 1936, do you?

A. No, I don't know anything about it.

Q. Nor do you know whether he attached a warehouse hose to the valve into the distilling material pipe line leading to top tank and turned on the water? A. No.

Q. Nor for what purpose that was done, it was intended for?

A. I don't know. I am not familiar with the situation, at all.

Q. You are not familiar with the situation, at all? A. No.

Q. Then you don't know whether the distiller neglected to open [84] the valve and if such had

(Testimony of G. B. Antonini.)

been done the water would have passed through the still discharging through slop line?

A. I didn't know anything about it.

Q. Nor do you know whether the water was turned off by an employee at the plant at 9:15 a. m. Sunday morning, December 27, 1936, of your own knowledge? A. No.

Q. Nor, as it is stated there, it was then discovered that the oversight on the part of the distiller in not opening the slop line valve caused the water to run through the still and overflow brandy receiving tank No. 27?

A. I don't know anything about it.

Q. Do you know where this information was obtained from?

A. Well, just as I say, I must have got that information in Mayhew's office.

Q. Did you have any information before you came to Mr. Mayhew's office on this day?

A. I heard that something was happening in the winery from Mr. Groci, but I don't know anything about it, because I was not there.

Q. Then did you write this letter, yourself?

A. No.

Q. Was it written by you or your dictation—did you dictate it to anyone? A. No.

Q. Did you authorize anybody to dictate it for you in this form? A. I did not.

Q. When did you first see this letter?

A. I see that letter now, but as I say, if I signed it I must have signed it at that [95] time, and if I

(Testimony of G. B. Antonini.)

signed it at that time I signed it on the advice of Mr. Mayhew; it was probably told me to sign it.

D. Do you know whether Mr. Mayhew was present on that occasion? Was he or not?

A. I think he was.

Q. You said there were two or three people there.

A. There were other people there besides Mayhew and I, but I don't know who they were.

D. Do you recall at this time who handed this letter to you?

A. I don't know, it is so long ago I couldn't remember.

Q. But you do recall that it was prepared and handed to you?

A. It was prepared and handed to me; there was some discussion and then Mr. Mayhew advised me to sign it.

Q. Were any of these statements made by any of the gentlemen present other than Mr. Mayhew, if he was present?

A. Well, as I say, somebody besides Mr. Mayhew was there, but I don't know who it was, I couldn't remember who it was.

Q. Do you recall whether it was any officer of the United States Government?

A. Well, I guess it was some agent or some inspector, or somebody, but I don't remember the name; I don't remember who it was because it was too long ago; there must have been somebody there.

(Testimony of G. B. Antonini.)

Q. Do you know whether that representative made this statement to you at that time?

A. I don't remember, it is impossible for me to remember, it was a long time ago and I don't remember.

Q. Do you recall having signed the original of this exhibit in [86] the presence of A. F. Bulfinch on the 30th of December, 1936?

A. Well, I don't remember, I couldn't say. Maybe I did, maybe not; I don't remember; I couldn't say one way or the other.

Q. Do you recall having been sworn and subscribing to this statement on that occasion?

A. Maybe I did and maybe not. I don't think I did. I don't think I would swear to anything. It is my recollection that I did not swear to anything, but still I could make a mistake. It is too long ago for me to remember, but I would say no.

Q. As to the rest of the information in here, this was all prepared and put in here and you had no knowledge of it at that time?

A. That is right.

Mr. Guerard: Don't lead the witness.

The Court: He does not remember anything about it, that is the substance of it.

Mr. Fouke: He did testify that he personally did not write it and it was not written at his direction, and he does recall that there was someone present.

The Court: Do you remember who was present?

(Testimony of G. B. Antonini.)

A. There was somebody there, but I couldn't say who it was, it is too long ago, I don't remember.

Mr. Fouke: Q. Your testimony is you did not dictate it, and you did not authorize it?

A. I had nothing to do with the writing or dictation.

Q. You signed it because you were told to sign it? [87]

A. I was pretty close to Mr. Mayhew and he advised me to sign it.

Cross-Examination

Mr. Guerard: Q. Mr. Antonini, there is no question but what you signed this paper that has just been exhibited to you?

A. That I signed it, yes.

Q. You admit you signed it?

A. That is my signature.

Q. You admit that you signed it in your official capacity as president of the Livermore Winery, Inc., did you not?

A. Well, I signed as president at that time, yes.

Q. You were president? A. Yes.

Q. You admit that you signed it in your official capacity, do you not? A. Yes.

Q. You were the president? A. Yes.

Q. But as I understand the substance of your testimony it is that while you signed it, and you admit signing it, you did not actually see the typing of the letter?

A. That is the letter, no.

Q. You don't know who typed it? A. No.

(Testimony of G. B. Antonini.)

Q. You don't know who was present except possibly Mr. Mayhew, is that correct?

A. I saw Mr. Mayhew there.

Q. Mayhew was there? A. Yes.

Q. Tell the Court who Mr. Mayhew was.

A. He had an office where they make the reports for the Government for the winery.

The Court: Is he a Government officer?

A. No, he is not a Government officer. He is a man in business and they charge [88] so much a month to make out the reports.

Mr. Guerard: Q. In other words, he was working under your direction, was he, a servant of the corporation?

Mr. Fouke: I object to that on the ground that the question has already been asked and answered, and he said he was in business and charged so much.

Mr. Guerard: This is cross-examination.

Mr. Fouke: But I am making that objection.

Mr. Guerard: Q. Mr. Mayhew was paid by the winery for the services which he performed?

A. Yes, any winery that he takes care of those things, make a report or anything like that, they certainly have to be compensated.

Q. And he was present when this data was accumulated and dictated to someone and later signed by you, isn't that a fact?

A. I don't know who dictated it, I signed it, because my signature is there. I know that, but I don't know who dictated the letter, I don't know that.

Q. Mr. Antonini, is it customary for you as

(Testimony of G. B. Antonini.)

president of this corporation to sign papers and swear to them and not know the truth of the contents of the documents which you signed?

A. Well, I suppose it was read to me, and I knew what I was signing, because I read the document there; we had a little discussion and then Mr. Mayhew told me to sign it.

Q. You believed it to be true when you signed it, didn't you?

A. Well, that was the information they gave me, but I wasn't [89] there to know it was true or not.

Q. But upon that information you believed it to be true?

A. I took it for granted. I suppose I was advised by Mr. Mayhew to sign it and I signed it.

Q. Even today you admit that it is true, don't you?

A. I don't know if it was true or not; I was not there to certify it was true; it was represented to me that way, but I don't know if it is true, or not.

Q. You don't know whether it is true, or not?

A. I don't know, no.

Q. But you signed it? A. I did sign it.

Q. Now, you say you were not at the plant on December 26th, 27th, 28th, 29th, and 30th of December, 1936. Is that correct? You were not at Liv-
ermore, were you? A. No, I was not there.

Q. That is your testimony?

A. That is my recollection.

Q. Where were you on December 22, 1936?

(Testimony of G. B. Antonini.)

A. I don't remember.

Q. Where were you on January 1, 1937?

A. Well, you ask me something I couldn't answer.

Q. In other words, you are simply guessing that you were not there on December 26th?

A. I am pretty sure I was not; that was after Christmas and I was at home. I would go up to Livermore once in a while, I couldn't say I was just there a certain day, because I don't know the day. I used to go there, I used to go several times, and I couldn't tell you the day I was there.

Q. It is your testimony that the office of the winery in [90] December, 1936, was on Broadway Street in San Francisco?

A. Yes.

Q. Didn't the winery have some sort of an office where records are kept at Livermore also?

A. Well, there was bookkeeping in the winery and there was also bookkeeping in the office. What do you mean, what kind of records do you mean?

Q. Well, is it true that all the records pertaining to manufacture of brandy or distilled spirits, or whatever you were making out at Livermore was kept at Livermore and not at the Broadway address that you have just stated?

A. I think they were compelled by the Government to keep them at the winery.

Q. I think that answers the question. They were kept out there?

A. Yes.

Q. In the office in San Francisco what records would you keep there, if any?

(Testimony of G. B. Antonini.)

A. Well, we had the seal, and also the collections, and things like that. That is what I call the office.

Q. Did you ever talk to Mr. Renteria about this matter? A. I did not talk to him.

Q. You never have?

A. I don't think I talked to him. Maybe I talked a little to him if I saw him when I came up to the winery. I don't remember if I did.

Q. You did not talk to him yesterday?

A. I was not here yesterday; I did not see him yesterday.

Q. You were not here yesterday? A. No.

Mr. Guerard: Mr. Renteria, will you please stand up? Is Mr. Renteria in court? (No response.)

Q. Was Mr. Groci the vice-president of your winery? A. Yes.

Q. What were his duties?

A. He was out at the winery at Livermore, in charge of the winery.

Q. He had charge of the winery?

A. He took care of the winery.

Q. In other words, he was in charge of the manufacture, is that right?

A. I don't know what he was in charge of. I know he took care of the winery. That is all I know; what department he was in charge of I couldn't tell you.

Q. The Livermore Winery, Inc. is a corporation, is it not? A. Yes.

(Testimony of G. B. Antonini.)

Q. You were duly elected president of that corporation? A. Yes.

Q. And Mr. Groci was duly elected vice-president? A. At that time, yes.

Q. You both held those positions on December 26, 27, and 28, 1936, is that correct? A. Yes.

Q. As I understand it, in order to be as brief as possible, this exhibit No. 4 which has been shown to you, I think you have admitted signing that in your official capacity, is that correct? A. Yes.

Q. And it bears the official seal of the corporation, does it not?

A. I don't see any seal of the corporation there.

Q. I will show you Exhibit No. 4, which you have heretofore seen, and call your attention to the seal appearing on the second page thereof, and ask you if that is the seal of the corporation. [92]

A. Oh, yes, I didn't see it, that is right, that is the seal of the corporation.

Q. That is the seal of the corporation?

A. Yes.

Q. That seal was in your office, was it not?

A. In Mr. Mayhew's office.

Q. He was your agent, is that right?

A. Well, he was employed by the winery.

The Court: Is that all from this witness?

Mr. Guerard: That is all.

Redirect Examination

Mr. Fouke: Just one question on that seal. Was this seal affixed in your presence?

(Testimony of G. B. Antonini.)

A. I couldn't remember if that was done. Mr. Mayhew put the seal of the corporation on these papers; I couldn't say if he did it when I was there or when I was not there, I don't remember.

Q. Was Mr. Mayhew on the salary roll as an employee of the Livermore Winery on that day, or did you hire him for different jobs from time to time and pay him for his services?

A. No, I think we used to give him so much a month; he used to charge very little.

Q. Was he an employee of yours, or merely hired to render independent service to the corporation?

Mr. Guerard: I object to the question.

Mr. Fouke: I will reframe the question. Q. Was Mr. Mayhew engaged in business on Market street under [93] his own name on December 30, 1936?

A. He was.

Q. Was he handling various accounts for different concerns, do you know?

A. That was his general business, to do that.

Q. And the account of the Livermore Winery was one of the many that he was handling on that occasion, is that right?

A. I presume so, because I know that was his business, doing work for different wineries.

Q. Did you have control over his method of corporations or his business, or where he did business?

A. No.

Mr. Fouke: That is all. I would like to call Mr. Maloni.

JOHN MALONI,

called for the defendant; sworn.

The Clerk: Will you state your name to the Court? A. John Maloni.

Mr. Fouke: Q. Mr. Maloni, where do you reside, where do you live? A. Livermore.

Q. Where were you living on December 27, 1936?

A. Livermore.

Q. On Sunday morning, December 27, 1936, at or about the hour of nine o'clock a.m. where were you, if you know? A. I was in the winery.

Q. What winery? A. Livermore Winery.

Q. Located where? A. West Third Street.

Q. In what city? A. Livermore.

Q. On that occasion what was the reason for your presence there, [94] if any? Why were you there? A. I was there to feed the dogs.

Q. Had you been there prior to that time on that day, or did you go there before, or at or about that time? A. I go there about that time.

Q. Where did you go on the premises of the Livermore Winery at about that time?

A. I went into the workshop to get the feed for the dogs.

Q. In what shop? A. The work shop.

Q. Where is that located in connection with the distillery in the premises of the Livermore Winery?

A. It is close to the distillery.

Q. Is it in the same building?

A. The same building.

(Testimony of John Maloni.)

Q. On that occasion were you employed by the Livermore Winery? A. Yes.

Q. How long had you been working for that concern? A. Since about November, 1933.

Q. 1933? A. Yes.

Q. Were you working for the Livermore Winery on December 27, 1933? A. Yes.

Q. Had you been working for them before that date? A. Yes.

Q. Had you been requested by anyone to go to the winery to feed the dogs on that day?

A. Yes.

Q. At that time what, if anything, did you observe in the distillery premises where you went on that occasion?

A. I went inside of the workshop to get feed for the dogs and saw brandy [95] running over the top of the tank.

Q. It was running over? A. Yes.

Q. Was it running over at the time you observed it? A. Yes.

Q. Did you observe brandy at any other place than running out of the tank?

A. I saw it on the floor.

Q. As to the floor, if you know, what kind of a floor is there in the distillery premises?

A. A concrete floor.

Q. In the entire premises?

A. Part dirt floor.

Q. Did you observe any brandy on the concrete floor? A. Yes.

(Testimony of John Maloni.)

Q. Did you observe any brandy on the dirt floor?

A. I don't remember seeing any on the dirt floor.

Q. Did you observe whether the floor was damp?

A. I don't remember.

Q. Did you see any brandy outside the distillery premises?

A. Yes.

Q. Did you see any?

A. Yes, on the floor.

Q. In the distillery premises?

A. In the distillery premises.

Q. Now, then, what did you do? Did you observe what was causing the brandy to flow over the tank?

A. No.

Q. What did you do at that time, if anything?

A. I ran down to call Mr. Kennedy and let him know about it, because it was running on the floor.

Q. Was that Douglas Kennedy?

A. Douglas Kennedy.

Q. How far away from the winery did he live?

A. About three blocks. [96]

Q. Did you ask him to come to the winery?

A. Yes.

Q. Did he come with you?

A. Yes.

Q. About what time did you get back to the winery?

A. About 9:15, fifteen minutes after nine.

Q. Did you observe what, if anything, Mr. Kennedy did?

A. I don't know exactly what he had been doing.

Q. After Mr. Kennedy got there did the brandy continue to run over the tank?

A. No, it stopped running right away.

(Testimony of John Maloni.)

Q. What, if anything, did Mr. Kennedy do, if you know? A. Well—

Q. (Interrupting): If you know, if you saw.

A. I couldn't exactly remember what he did.

Q. Did you see him do anything?

A. No, because he was ahead of me on the steps to go up in the still; I don't know exactly what he did.

Q. You did not go back in the still room again, into the distillery room?

A. Yes, I have been there.

Q. I mean on that day.

A. He went ahead of me, I called him from his home.

Q. How long did you remain on those winery premises on that day?

A. I don't exactly remember, I think I left about something about ten o'clock.

Q. About ten o'clock?

A. Something like that.

Q. Before you left, did anyone else arrive at the premises? A. I don't remember. [97]

Q. That you saw? Did you see anybody else come there? A. No.

Q. Was Mr. Kennedy still there when you left?

A. Yes.

Q. Did you see anyone else in the premises before you left there? A. No.

Q. You left about ten o'clock?

A. Something like that.

Q. And didn't return until when?

(Testimony of John Maloni.)

A. The next day.

Q. The next day? A. The next morning.

Q. The next morning did you see anybody at the premises?

A. Well, Kennedy was there, but I don't remember who else was there any more.

Q. Was there any officer of the corporation there?

Mr. Guerard: I object to the question as leading. A. I don't remember.

The Court: He don't remember.

Mr. Fouke: Q. Would you say that there were any other people there?

A. I think there were some working men around there, but I don't remember who was there.

Q. You don't recall anybody else being there?

A. No.

Q. What time did you get there the next morning? A. At eight o'clock.

Q. That was December 27? A. Yes.

Q. What time was it that you left, if you remember? A. That is December 27?

Q. December 27.

A. I think it was a day after the 27th.

Q. You were not there after ten o'clock on December 27th? [98]

A. I was there at nine o'clock on that day.

Q. On the 27th? A. Yes.

Q. And on the 28th you came there and you did not see anybody around the place except workmen? A. I don't remember that.

(Testimony of John Maloni.)

Q. What did you say?

The Court: He said he doesn't remember.

Mr. Fouke: You don't remember seeing anybody there?

A. I don't know who was there or if there was anyone there.

The Court: Is that all from this witness?

Mr. Fouke: Yes.

Cross-Examination

Mr. Guerard: Q. Are you still employed at the winery. A. Not now.

Q. But you were working there in December of 1936, and particularly on December 26, 27, and 28, is that right? A. Yes.

Q. On the morning of December 26th you simply went to the distillery for the purpose of feeding the dogs, is that correct? A. The 26th.

Q. Yes—no, the 27th.

A. That was on the 27th.

Q. On the 27th you were simply there for the purpose of feeding the dogs? A. Yes.

Q. While you were there you noticed tank No. 2 was overflowing?

Mr. Fouke: He did not say tank No. 2.

A. I don't know which tank.

Mr. Guerard: Q. There was a tank overflowing? [99]

A. There was a tank overflowing.

Q. You don't know which tank it was?

A. I don't remember which tank it was.

(Testimony of John Maloni.)

Q. But you remember that some tank was overflowing? A. Yes.

Q. You remember that there was also a concrete floor there? A. Yes.

Q. And that some brandy or some distilled spirits of some sort was on the concrete part of the premises? A. Yes.

Q. But there was none that you saw on the dirt?

A. I don't remember.

Q. Do you know what was done with the spirits or whatever might have been on the concrete part of the distillery?

A. I couldn't answer that question, I don't understand.

Q. You didn't sweep it out into the sump, did you? A. No.

Q. In other words, you did not do any work there at all other than to perform this chore of feeding the dogs? A. No.

Q. Then when you discovered that you notified Mr. Kennedy? A. Yes.

Q. And Mr. Kennedy's job was what?

A. Well, he came out and took care of that.

Q. What was his job?

A. He was in charge.

Q. He was in charge there, was he?

A. I don't know about that, but he used to run the still in the day time.

Q. He was distiller in the daytime?

A. Yes.

(Testimony of John Maloni.)

Q. Then you went to his house about three blocks away? A. Yes. [100]

Q. And came back to the distillery with him?

A. Yes.

Q. That is about all you really know about it?

A. Yes.

Mr. Guerard: That is all.

GUIDO GRANUCCI,

called as a witness for the defendant; sworn.

The Clerk: Will you state your name to the court? A. Guido Granucci.

Mr. Fouke: Q. On December 26th, 27th, 28th, 29th, and 30th, 1936, where did you reside?

A. 1466 Chester Street, Livermore.

Q. Were you employed at that time?

A. Yes.

Q. By whom were you employed?

A. Livermore Winery, Inc.

Q. What were your duties?

A. Well, taking care of the details of the work around the winery.

The Court: Manager? A. No.

Q. Superintendent?

A. No, just working in the office.

Q. What were your duties?

A. Well, taking care of the Government records, and orders from San Francisco, taking care of the Government stamps.

(Testimony of Guido Granucci.)

Mr. Fouke: Q. Now, on December 26, 1936, do you know whether John Maloni was employed by the Livermore Winery? A. He was.

Q. Do you know what his duties were there?

A. He was doing general work in the winery.

Q. In the winery? A. Yes. [101]

Q. Did your duties in the winery include the distilling?

A. No, the distilling was taken care of by day by Douglas Kennedy and Joseph Renteria at night.

Q. Do you know who the distiller was for the Livermore Winery on the day shift on December 26, 1936?

A. Douglas Kennedy should have been.

Q. Do you know whether he was?

A. Well, I was not there at the time; that was his regular shift.

Q. In other words, were you at the winery premises on December 26, 1936, to December 30, inclusive?

A. No, I was in Livermore, but I was not there at that time.

Q. You were not there at that time?

A. No.

Q. Are you connected with the Livermore Winery at the present time? A. Yes.

Q. What is your position with the winery?

A. Secretary.

Q. Secretary of the corporation?

A. Yes.

(Testimony of Guido Granucci.)

Q. Are you familiar with the premises of the Livermore Winery? A. I am.

Q. Were you familiar with the premises on the date that I mentioned, at or about that time?

A. Yes.

Q. Will you state the number of tanks, if any, located in the distilling premises of the winery at that time?

A. There were two distilling material tanks and two brandy-receiving tanks.

Mr. Guerard: How many tanks in all?

A. Four tanks, then [102] we had the singling tank, the charging tank, and an overflow tank.

The Court: How many, in all, at that time?

A. There were seven at that time, approximately.

Mr. Fouke: Q. Do you know approximately the capacity of those sump tanks 1 and 2?

A. Well, there was one approximately 200 gallons, and one approximately 400 gallons, as I recall.

Q. You testified there were seven tanks. Was one of those tanks what you call a singling tank?

A. The singling tank holds about 150 gallons.

Q. Where is that located in the premises?

A. Below the tribox.

Q. Is there a distilling material overflow tank?

A. Yes.

Q. Do you know about how many gallons capacity that had?

A. That would hold approximately 180 gallons.

(Testimony of Guido Granucci.)

Q. Is there another overflow tank of about 398 or 400 gallons adjacent to the sump for distilling material, just above the sump, to the side?

A. No, there is a receiving tank.

Q. How many gallons was that?

A. They held approximately 5000 gallons apiece, I think.

Q. They are likewise brandy tanks, are they not?

A. Brandy receiving tanks.

Q. What is the capacity of those, if you know?

A. As I recall about 3000, one of them, and about 2200.

Q. What do you call the tank which is just above the tank under the still?

A. Singling tank. [103]

Q. That is a singling tank? A. Yes.

Q. Then there was a distilling material tank below the singling tank. About what capacity was that?

A. That was around three or four hundred gallons.

Q. Now, as to the condition of the premises, do you know what kind of a floor there was there?

A. Well, for the brandy receiving tank we had concrete, and in the distillery we had concrete, and in the workshop, which was right next to the distillery, it was just plain dirt.

Q. Have you seen the plans of the winery, that is, of the distillery—have you seen those in the course of your activities in connection with the winery at any time? A. Oh, yes, I have.

(Testimony of Guido Granucci.)

Q. And the area you refer to is within the area of the distillery on those plans? A. Yes.

Q. Are you familiar with the operation of the still? A. Not very much.

The Court: He is an office man.

Mr. Fouke: Q. Have you worked around the still at any time?

A. No. I would not know how to run it.

Q. Did you ever go in the distillery, itself, in connection with your duties, to get any records or anything?

A. Yes, in making out the reports I would go in and ascertain how much distilling material they had, what percentage and how much there was in the tanks.

Q. Are you familiar with the general plan of the winery and [104] the buildings in the winery premises? A. Yes, I think so.

Q. As they were at that time? A. Yes.

Q. What building is adjacent to the distillery to the northeast of the winery, do you know?

A. There is storage there and also a shipping platform.

Q. By shipping platform what do you mean?

A. Well, at that time we shipped quite a bit of wine in barrels, and we had a spur track running back of the winery, and the barrels were on the platform and loaded onto the cars.

Q. That was to the north, was it, or northeast?

A. Northeast.

(Testimony of Guido Granucci.)

Q. Then at the easterly portion of the building what was there?

A. We had a concrete bonded warehouse for storage of brandy.

Q. For storage of what?

A. Of brandy, commercial brandy. Part of the room was partitioned off and we used that for a fortification room.

Q. Was there any connection between that place or any means of communication and the distillery?

A. Yes, there was a pipeline going from the distillery to the fortifying room.

Q. Was that fortified brandy brought from the distillery premises over to the bonded warehouse you have just testified to?

A. The brandy was taken into the bonded warehouse, it was first gauged in the brandy-receiving room that we had there where we had barrels and they were filled with brandy and after they were gauged they were stored in the warehouse.

Q. They were taken to the warehouse, but as to the fortification [105] room there was a pipeline?

A. Yes.

Q. Was that connected with the receiving tank?

A. No.

Q. Did you have any keys to that tank?

A. No, the Government gauger had the key for that.

Q. Were there any other locks on any of the other tanks in the distillery premises?

A. All of the tanks in the distillery premises

(Testimony of Guido Granucci.)

having brandy were all locked by Government locks or Government seal.

Q. Neither you nor any other officer of the corporation had a key, did you? A. No.

Q. In order to remove any brandy out of the receiving tanks in the distillery premises what was it necessary to do or what was done?

A. Well, there had to be a Government gauger present.

Q. What did he do?

A. He opened up the valves.

Q. Did he do anything before he opened the valves as to the brandy in the receiving tanks?

A. If commercial brandy was being made they stirred it up and they had to cut it down to a certain proof.

Q. Bring it down to a certain proof, that was done before the locks were fastened by the gauger with the key that he had? A. Yes.

Q. Before any process of removal of any material from the brandy-receiving tank commenced, is that not true? A. Yes.

Q. Now, these brandy-receiving tanks, are they connected in [106] any way with the still?

A. They are connected, they have a pipe going to them, which was sealed.

Q. Are there any locks connected with that?

A. There is a lock on the manhole of the tank, and there is a lock at the valve bottom of each tank, and a seal.

Q. All of those must be opened or removed by

(Testimony of Guido Granucci.)

the Government gauger in order to permit any material to go out? A. That is right.

Q. Now, as to the distilling material that was used in fortification, you said that it went through the pipe from the receiving tank after the pipes were opened or valves were opened by the gauger and the locks removed? A. Yes.

Q. You said that there is a fortification room and a tank to which a pipe is connected that leads to the distillery? A. Yes.

Q. And for that material to go over to the fortification room locks and valves are opened by the Government gauger? A. That is right.

Q. So then it was moved over to the fortifying room and placed in a tank there? A. Yes.

Q. Is that tank sealed?

A. That tank is also sealed.

Q. Are there any locks attached to it?

A. The valve on the bottom has a device that goes in about two or three feet, and it is possible to lift that up from the tank.

Q. And the brandy or the distilled spirits of brandy is then [107] gauged and proofed at that point, is it? A. Yes.

Q. Before it is permitted to be released for fortification purposes? A. That is right.

Q. And then where does the distilling material go after that time, that is, the brandy.

A. Well, after it is gauged, he takes a reading of the brandy and he makes the fortification to bring it to a certain proof, and after that is finished

(Testimony of Guido Granucci.)

he opens the lock and admits the brandy into the fortifying tank.

Q. You mean there are pipes attached to other containers?

A. There is a valve that dumps right into the fortifying tank.

Q. And in the fortifying tank this brandy goes?

A. Yes.

Q. And then from there is removed where?

A. Back to the winery.

Mr. Fouke: No further questions.

Cross-Examination

Mr. Guerard: I believe you testified that you were not familiar with the operation of this still.

A. I am not.

Q. So all of the methods of procedure that you have talked about right now and just have testified to are hearsay, are they not?

A. Well, I have watched it.

Q. You can tell how you believe it is operated?

A. No, I have watched.

Q. You have watched, but not operated, yourself? A. Not distilled.

Q. You say you never worked in the distillery?

A. No.

Q. Except as a clerk, in December, 1936?

A. That is right. [108]

Q. And that you are now the secretary?

A. That is right.

Q. Now, at that time you were in charge of all

(Testimony of Guido Granucci.)

the records that were kept at the Livermore Winery? A. That is right.

Q. You kept all of the records? A. Yes.

Q. And do you know the contents of tank No. 2 on the night of December 26th?

A. I think 2200, I think it is around 2200 gallons.

Q. You were not there on December 26th?

A. No.

Q. You were not there on December 27th?

A. No.

Q. You were not there on December 28th and you don't know what happened?

A. That is right.

Q. With reference to this particular brandy on any of those days? A. That is right.

Q. That is correct? A. That is correct.

Mr. Guerard: That is all.

The Court: We will take a recess now until two o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [109]

Afternoon Session

Mr. Fouke: If your Honor please, certain witness whom we had expected to have available are not available, and therefore I will conclude our case by having Mr. Groci sworn merely to refute, and for that special purpose, statements of Mr. Bulfinch.

GUISEPPE GROCI,

called as a witness for the defendants; sworn.

The Clerk: Q. Will you state your name to the court, please?

A. Guiseppe Groci.

Mr. Fouke: Q. Mr. Groci, did you have any conversation, or was there any conversation in your presence and in the presence of Mr. Bulfinch, who has already testified, and Mr. Browning on December 26, 1936—Saturday, December 26, 1936?

A. I was not in Livermore.

Q. Did you have any conversation with them, or was there any conversation had in your presence?

A. No.

Q. When they were present? A. No.

Q. Now, repeating the same question as to Monday, December 28th, did you have any conversation with either or both of those men, or was there any conversation had in your presence? A. No.

Q. When they were present? A. No. [110]

Q. Where were you on December 28, 1936, if you know? A. In San Francisco.

Q. Did you have any conversation with Mr. Bulfinch or Mr. Browning on December 27th, 1936?

A. No.

Q. Was there any conversation had in your presence at which other persons were present, including Mr. Browning and Mr. Bulfinch?

A. No, I never had any.

Q. Were you at the Livermore Winery on December 27, 1936? A. Yes.

(Testimony of Guiseppe Groci.)

Q. How do you know that you were at the Livermore Winery on December 27, 1936?

A. I know because somebody called me up in San Francisco and told me there was some trouble in the distillery, so I called up Mr. Boone.

Q. Who is Mr. Boone?

A. Mr. Boone is in the Alcohol Tax Unit, I know him, and I told him there was some trouble up in the winery and I wished he would send somebody up there.

Q. What did Mr. Boone say?

A. Mr. Boone said, "It is pretty hard to get any inspector, I will try, and if I can I will call you back in fifteen or twenty minutes," and in fact he called me back.

Q. What did he tell you when he called back?

A. He told me he had an agent on the way already, and for me to go out.

Q. Did you go out? A. I went out.

Q. Other than on that day were you at the Livermore Winery on either December 26 or December 28? A. No.

Mr. Fouke: No further questions. [111]

Cross-Examination

Mr. Guerard: Q. Mr. Groci, you are vice-president, are you, of the Livermore Winery?

A. Yes.

Mr. Fouke: Just a minute. I move that the answer be stricken as improper cross-examination, in that he has not testified to that on direct examination.

(Testimony of Guiseppe Groci.)

The Court: Objection overruled. He may answer.

Mr. Fouke: Exception noted.

A. Yes.

Mr. Guerard: Q. You were not at the winery on December 26, 1936?

Mr. Fouke: Again I object to the question on the ground it has already been asked and answered.

The Court: He is not bound by your answer. He is under cross-examination.

Mr. Fouke: That is right.

A. No.

Mr. Guerard: Q. How do you know you were not?

A. Because I know I was in San Francisco. I remember now, because they called me up the next day on account of trouble, the next morning.

Q. They called you up. Who called you up?

A. From the winery.

Q. Who at the winery?

A. The winery at Livermore.

Q. But what person called you?

A. Somebody from the winery called me up.

Q. You don't know who it was?

A. I do not recall the name. They said there was some trouble at the winery.

Q. That was on December 27th?

A. December 27th.

Q. Then you testified you called Mr. Boone, who is connected with the Internal Revenue Department?

A. I did.

(Testimony of Guiseppe Groci.)

Q. How do you know it was Mr. Boone?

A. Because I know him; I know him a long time.

Q. Did you recognize his voice?

A. Well, I called for Mr. Boone, and he said, "This is Mr. Boone on the telephone."

Q. But you don't know Mr. Boone's voice do you? A. Sure I know.

Q. You don't know what Mr. Boone you talked to?

A. Mr. Boone is now in the Alcohol Tax Department.

Q. But there might be several Mr. Boones there. Which Mr. Boone are you referring to?

A. He is the supervisor of something, I don't know exactly what it is, but he is in the Alcohol Tax Unit.

Q. He told you to go out there?

A. I called him from San Francisco, I called Mr. Boone, and Mr. Boone came on the phone.

Q. What did he tell you to do about it?

A. I told him there was trouble at the winery at Livermore, in the distillery, and I told him if it is possible I don't want any trouble, to send some inspector out. He said on Sunday it is impossible, I don't know where to get him. He said, "I will call you back if I can get him." So in about fifteen or twenty minutes he [113] called me back.

Q. Do you know Mr. Bulfinch?

A. Well, I met him on the 27th at the winery.

Q. Did you meet Mr. Browning on the 27th?

(Testimony of Guiseppe Groci.)

A. Mr. Browning, yes, was there.

Q. Mr. Browning and Mr. Bulfinch were both there on the 27th? A. Yes.

Q. Was Mr. Antonini there? A. No.

Q. He was not there?

A. No, Mr. Antonini was not there.

Q. What was the nature of the business transacted between you and Mr. Browning and Mr. Bulfinch?

Mr. Fouke: I object to that question, that was no part of the direct examination.

Mr. Guerard: Q. Did you have any conversation with those men, at all? A. No.

Q. No conversation, at all?

A. No, nothing.

Q. You are sure of that? A. Yes.

Mr. Guerard: That is all.

Mr. Fouke: No further questions.

The Court: Is that the case?

Mr. Fouke: The defendants rest.

Mr. Guerard: We have nothing in rebuttal. What do you propose to do now, Counsel?

Mr. Fouke: I propose at this time, if your Honor please, to make a motion to strike one of the exhibits from the record, [114] Plaintiff's Exhibit 5.

The Court: There is only one item in that, as I remember it.

Mr. Guerard: That is correct.

The Court: The motion will be denied. There

is only one item there, and that is all that was offered, that one portion of it.

Mr. Fouke: They offered the whole thing.

Mr. Guerard: Yes. The photostatic copy which we introduced had attached to it that which related to this particular transaction. The original consisted of eighteen items and we only photostated the item relating to this particular transaction.

The Court: For that limited purpose I will allow it.

Mr. Fouke: The basis of it is that this exhibit is not a photostatic copy.

The Court: The motion will be denied.

Mr. Fouke: Might the record also show upon the further ground that no foundation has been laid for the introduction of the assessment certificate, or any of the information therein contained.

The Court: Very well.

Mr. Fouke: Now, then, if your Honor please, at this time I would like to make a motion for judgment in favor of the defendants by reference without at this time going over the points I made in connection with the motion, that is, the motion to [115] strike out, and also the motion for judgment at the time that plaintiff rested its case. And in addition to that I would like to state that plaintiff has failed to introduce any evidence to establish the allegations contained in either the first or second causes of action indicating, first, that there was a removal of any distilled spirits from the premises in question, the evidence being confined to the fact

that were distilled spirits on the floor of the distillery premises and not elsewhere.

The Court: He answers that by saying it was manufactured.

Mr. Fouke: But as to that our position is that on the one hand a tax may attach but a tax is not due and payable until removed from the distillery premises, and it is only at that time, under the statute, and under the cases, that a tax becomes due and payable; therefore, that being the case, there is no basis for an assessment, or a levy, or any other action on the part of the Government, because the statute does not authorize or provide any such action in connection with this particular statute upon which the complaint is based.

In addition to the first point, then, that the spirits were not removed, the second point, namely, that there was no computation or method of computation of arriving at the quantity of distilled spirits alleged to have been manufactured, has not been set forth in the evidence, and is not available nor capable of ascertainment upon the computation, because, as the evidence has indicated, there was a series of tanks as to [116] which nothing was done or no gauging or computation was made as to the quantity of material in them. In short, an arbitrary figure was taken.

(After argument the case was submitted upon briefs to be filed.)

[Endorsed]: Filed Aug. 21, 1945. [117]

[Endorsed]: No. 11145. United States Circuit Court of Appeals for the Ninth Circuit. The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 24, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11145

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation, of Saint Paul, Minnesota, and
LIVERMORE WINERY, INCORPORAT-
ED, a California corporation,

Defendants and Appellants.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY UPON
APPEAL

On this appeal, Appellants intend to rely upon the following points:

(1) In that the facts found by the Trial Court do not support its conclusions of law;

(2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;

(3) In impliedly finding that there was removed on December 26th and December 27th, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, a California corporation, 1619.56 proof gallons of brandy. There is no evidence to support such finding.

(4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,101.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is no evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence

December 26th and 27th, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4th and May 15th, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of \$2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of \$3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26th and 27th, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in

the sum of \$3,239.00, together with a penalty of 5% thereon in the amount of \$161.95, and interest on the said \$3,239.00 at the rate of 6% per annum from May 4, 1937, to date hereof in the sum of \$1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and plaintiff's Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said Exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, president of Livermore Winery, Inc., and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants'

objection an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, located on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection testimony of Mr. Bulfinch relating to his calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record plaintiff's Exhibits 1, 4, 5, 6 and 7.

Dated: September 25th, 1945.

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Appellants.

Service of the within Statement of Points on Appeal by copy, admitted this 25th day of September, 1945.

FRANK J. HENNESSY,

Attorney for Appellee.

By ALBERT S. GUERARD.

[Endorsed]: Filed September 25, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants designate the entire record as necessary for the consideration of this proceeding, as certified by the Clerk of the United States District Court.

Appellants designate and respectfully request the printing of the Transcript of Record on Appeal, prepared by the Clerk of the District Court, excluding therefrom certain voluminous exhibits which, pursuant to Stipulation and Order are au-

thorized to be incorporated by reference but eliminated from the printed record.

Dated: September 25th, 1945.

ROBERT H. FOUKE,
Attorney for Appellants.

Received copy of foregoing Designation this 25th day of September, 1945.

FRANK J. HENNESSY,
Attorney for Appellees.

By ALBERT S. GUERARD.

[Endorsed]: Filed September 25, 1945. Paul P. O'Brien, Clerk.

No. 11,145

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation of Saint Paul, Minnesota,
and LIVERMORE WINERY, INCORPORATED,
a California Corporation,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANTS.

ROBERT H. FOUKE,

HANS A. KRUGER,

ROBERT A. WERTSCH,

Russ Building, San Francisco 4,

Attorneys for Appellants.

FILED

MAY 7 - 1946

PAUL P. O'BRIEN,
CLERK

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No. 11,145

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation of Saint Paul, Minnesota,
and LIVERMORE WINERY, INCORPORATED,
a California Corporation,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANTS.

STATEMENT REGARDING JURISDICTION.

The United States of America filed the within action against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation of Saint Paul, Minnesota, as surety, and the Livermore Winery, Incorporated, a California Corporation, as principal, to enforce collection of Internal Revenue taxes upon distilled spirits and to enforce collection thereof upon a bond given to guarantee payment of the same.

The complaint (R. 2-22) sets forth two causes of action, wherein it is contended (R. 3 and 7) that the District Court had jurisdiction over the causes of action in accordance with the requirements of Section 3740, Title 26, *United States Code* and by virtue of Section 41, subdivisions 5 and 9 of Title 28, *United States Code*. The first cause of action seeks a recovery of certain taxes alleged to be due from defendant Livermore Winery, Incorporated, based upon the alleged distillation and removal from the distillery premises No. 306 of certain distilled spirits, to-wit, brandy, and that the tax was imposed thereon by Section 1150, Title 26, *United States Code* (1934 Ed.) (R. 5), pursuant to notice and demand therefore. The second cause of action is directed against both defendants and seeks to recover, pursuant to notice therefor, the amount of the tax alleged to be due and payable from the Livermore Winery, Incorporated, under and by virtue of the terms and conditions of a fruit distillers bond (R. 13-20) executed by the defendants as principal and surety thereunder.

The present appeal is from a judgment of the District Court (R. 40-41) based upon findings of fact and conclusions of law (R. 34-39), and this appeal is taken from said judgment to this Court, which has jurisdiction to review said judgment by appeal, in accordance with Section 225(a), Title 28 *United States Code*, Section 128(a) of the Judicial Code.

STATEMENT OF THE CASE.

On December 26, 1936, defendant Livermore Winery, Incorporated, was engaged in the business of manufacturing sweet wines at its winery located at Livermore, California. In this connection, said defendant had caused to be issued the required bonds as a wine maker and as a fruit distiller, in compliance with federal law, covering its operations of a (1) distillery, (2) distillery warehouse (used for storage of brandy and use in the fortification of wine), and (3) a winery.

This action was instituted by the United States of America only upon the fruit distillers bond given by said defendant, as principal, and the defendant The Saint Paul Mercury-Indemnity Company of Saint Paul, as surety, whereunder said parties agreed to pay all taxes due and payable upon distilled spirits produced by the principal at the distillery during a period of one year from June 26, 1936 to April 30, 1937 at the rate imposed by law. The complaint sets forth two causes of action, the first against the defendant winery and the second against both defendants under the bond.

Under the first cause of action, and as realleged in the second cause of action, plaintiff alleged that said defendant winery distilled 1619.56 proof gallons of distilled spirits during the month of December, 1936, and “removed” said distilled spirits, to-wit, brandy, from the premises of Fruit Distillery No. 306, at which time the tax imposed thereon under Section 1150, Title 26, *United States Code* (1934 Ed.) “thereby be-

came due and payable", (R. 5) which allegation is denied by the defendants (R. 23), as is plaintiff's allegation (R. 5-7) that "in compliance with law, the Commissioner of Internal Revenue on April 23, 1937, levied and assessed the tax upon said distilled spirits so removed from said distillery premises" (R. 23); also, that defendant winery alleges as an affirmative defense, that it has paid all taxes legally levied and assessed on and against said defendant upon any and all distilled spirits distilled at the Fruit Distillery No. 306 and removed therefrom (R. 25-26), and defendants alleged further that they are not indebted to plaintiff in any sum whatsoever (R. 26) by reason of the alleged manufacture of said brandy or under the said fruit distillers bond.

Defendants set forth affirmatively (R. 26-33) that said distilled spirits, upon which the tax is sought to be collected, were never "removed" from Fruit Distillery No. 306; hence, the tax imposed, levied and assessed against defendant winery never became due or payable (R. 26); also, that a certain quantity of distilled spirits, believed to be the amount of 1619.56 proof gallons, were produced and lost by reason of the mixing of water with an unknown quantity of distilled spirits manufactured and placed in a receiving tank in the Fruit Distillery No. 306; that said loss was occasioned by and was a casualty that occurred without any fraud, collusion or negligence of the owner thereof, namely, defendant winery; hence, under the provisions of Section 2901(b) of the *Internal Revenue Code*, 1939, U.S.C.A., Title 26, defendant

winery was entitled to have any tax assessed or imposed upon said distilled spirits abated, or refunded, if paid. In this connection, reference is made to Section 3031 of the *Internal Revenue Code*, 1939, U.S.C.A., Title 26 distinguishing between a "distillery", "fortification room", "bonded warehouse", and a "winery", as well as between an owner of distilled spirits or wine as an individual, or his agents; also, setting forth (R. 32) that neither of said defendants have ever been indemnified or recompensed for such loss suffered by defendants, as required under said statutes as a prerequisite to remission or refund of any tax otherwise due.

Defendants allege (R. 26-29), as an affirmative defense to the instant action: That without the knowledge or consent of defendant winery, a person unknown, caused a hose to be connected to and with the Livermore city water system on said distillery premises, and then to be joined and connected to an unsealed faucet, the existence of which was unknown to defendant and which unsealed faucet had been installed without the knowledge or consent of defendant, in and on the distilling material line connected with the still on said distillery premises; that thereafter a faucet was turned on by persons unknown to defendant, and without the knowledge of defendant, so that said water from the Livermore city water system was caused to flow through said hose into the distilling material line, and then into a still located in Fruit Distillery No. 306, and which still was connected with Receiving Tank No. 2 in said distillery premises;

that thereafter the still filled with water so as to cause the water therein to overflow through the vapor line, condenser and trybox and into Receiving Tank No. 2, in which an unknown quantity of distilled spirits or brandy had previously been placed; that said water flowing into Receiving Tank No. 2, as aforesaid, caused said tank to become completely filled with water and brandy so as to cause the same to and it did overflow upon and in the premises known as Fruit Distillery No. 306, and not elsewhere.

That at no time prior to the overflowing of Receiving Tank No. 2, as aforesaid, had said distilled spirits therein been gauged as to quantity, proof, or gallonage;

That thereafter, an employee of plaintiff gauged and tested the brandy and water remaining in Receiving Tank No. 2 and concluded therefrom and on a hearsay statement submitted to plaintiff's said employee, by a person or persons unknown, that approximately the sum of 1619.56 proof gallons of brandy previously distilled had been lost by reason of the overflowing of Receiving Tank No. 2 occasioned by the running of water therein;

That in the belief that said sum of 1619.56 proof gallons represented a determined and fixed, rather than an estimated, loss occasioned by the overflowing of the water and brandy out of and from Receiving Tank No. 2, defendant, Livermore Winery, Incorporated, erroneously reported to plaintiff the production of the aforesaid sum of 1619.56 proof gallons

of brandy and the resulting loss thereof, when in fact there has never been ascertained and determined to date the actual quantity, or proof gallons, of distilled spirits, to-wit, brandy, actually produced on December 26, 1936, or the alleged loss thereafter on said date and on December 27, 1936;

That defendant cannot ascertain and does not know how much, if any, proof gallons of brandy were produced and lost by reason of the overflowing of Receiving Tank No. 2, as aforesaid; and,

That thereafter an unknown quantity of the distilled spirits contained in the water that had overflowed from Receiving Tank No. 2 was recaptured in Fruit Distillery No. 306 and was thereafter redistilled and all taxes due and payable thereon were paid in the form and manner provided by law following the removal of said brandy from Fruit Distillery No. 306.

Upon the trial of the case, the District Court judge, over the repeated objections and motions to strike of defendants permitted plaintiff to introduce hearsay evidence and exhibits without proper foundation having first been laid therefor and authorized the introduction into evidence of photostatic copies of alleged documents without proper foundation having first been laid therefor, or proof that they were exact photostatic reproductions of original exhibits; also, said District Court judge permitted the introduction into evidence of notices which were admittedly not copies of the original notices, without proper foundation having first been laid therefor or demand made for the production of the original notices.

Upon the submission of the case, the District Court judge denied the defendants' motion to set aside the judgment (R. 41-49) so as to allow defendants the opportunity of presenting objections to the findings of fact and conclusions of law theretofore prepared by the attorney for plaintiff and allegedly mailed by said attorney to defendants' attorney but never received by defendants' attorney.

SPECIFICATION OF ERRORS.

The errors relied upon in this appeal are those set forth in the statement of points on which appellants intend to rely (R. 57-61) as follows:

The District Court erred:

- (1) In that the facts found by the trial Court do not support its conclusions of law;
- (2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;
- (3) In impliedly finding that there was removed on December 26 and December 27, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, at Livermore, California, 1619.56 proof gallons of brandy. There is no evidence to support such finding.
- (4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding Number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,010.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 proof gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is no evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence December 26 and 27, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4 and May 15, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of \$2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of \$3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26 and 27, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in the sum of \$3,239.00, together with a penalty of 5% thereon in the amount of \$161.95, and interest on the said \$3,239.00 at the rate of 6% per annum from May 4, 1937, to date hereof in the sum of \$1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made

or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection, Plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and Plaintiff's Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendant's objection, Plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection, Plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, President of Livermore Winery, Incorporated, and overruling defendants' objection to the admission of said exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants' objection, an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, located on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection, testimony of Mr. Bulfinch relating to his

calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record Plaintiff's Exhibit Nos. 1, 4, 5, 6 and 7.

SUMMARY OF ARGUMENT.

I. That the distilled spirits upon which the tax was imposed, to-wit, brandy, was never "removed" from the distillery premises; hence no tax became due and payable.

II. That all taxes due and payable upon all distilled spirits "removed" from the distillery premises were paid.

III. That any tax, otherwise due and payable, must be abated or refunded as the loss of the distilled spirits was in and on the distillery premises, and even if removed therefrom, must be abated because occasioned by a casualty without any fraud, collusion or negligence of the owner thereof.

IV. That a compliance with law, in connection with the levy and assessment of the alleged tax, was not established.

V. That the quantity of distilled spirits produced, upon which the tax was assessed, was not established.

VI. That the District Court erred in admitting exhibits without proper foundation having first been established therefor.

VII. That the District Court erred in refusing to order the production of the distillery plans for the purpose of cross-examination of a witness who had testified regarding the operation of the distillery included therein.

VIII. That the District Court erred in admitting hearsay evidence which was no part of the *res gestae*.

IX. That, as the information contained in Plaintiff's Exhibit No. 4 was established to have been based upon incorrect information supplied by plaintiff, it was error for the District Court to admit such exhibit in evidence.

ARGUMENT.

I.

THAT THE DISTILLED SPIRITS UPON WHICH THE TAX WAS IMPOSED, TO-WIT, BRANDY WAS NEVER "REMOVED" FROM THE DISTILLERY PREMISES; HENCE NO TAX BECAME DUE AND PAYABLE.

Under Chapter 26, subchapter A, Part I, Section 2800(a) of the *Internal Revenue Code*, a tax on all distilled spirits in bond or produced in or imported into the United States at the rate therein provided is authorized to be levied and collected thereon "to be paid by the distiller or importer when withdrawn from bond". Said law provides further (Sec. 2800(b) (1)) that the "time" for payment of the tax on bonded distilled spirits is covered by the above Section 2800(a) (1).

In the event the distilled spirits are not bonded, the statute (Sec. 2800(b) (2)) provides as follows:

"The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 3312, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law."

Further, Chapter 26, Part IV, Sec. 2900 provides:

“General Rule.—All distilled spirits entered prior to July 26, 1936, for deposit in a distillery, general, or special bonded warehouse, or after such date entered for deposit in an internal revenue bonded warehouse, shall be withdrawn therefrom within eight years from the date of original entry therein, except as provided in subsection (b) of this section.”

“Exception.—Distilled spirits which on July 26, 1936, are eight years of age, or older, and which are in bonded warehouses, may remain therein after such date; but no allowance for loss by leakage or evaporation shall be made in the case of such spirits with respect to any period after such date: *Provided*, That loss allowances for such spirits for the period prior to July 26, 1936, shall be made pursuant to the provisions of the Act of February 6, 1925, c. 143, 43 Stat. 808.”

Consequently, where, as in this case, the evidence discloses (R. 118, 119, 167) that the distilled spirits, to-wit, brandy, alleged to have been removed from the premises of Fruit Distillery No. 306 (R. 5-7) were never removed therefrom, no tax thereon became due and payable nor did the Collector of Internal Revenue have any right to levy and assess any tax thereon.

If the distilled spirits lost had remained in the distillery and had not been withdrawn within eight years from the date of the original entry therein, then a tax would have become due and payable thereon, but such condition does not prevail here, in

that it is contended that the distilled spirits sought to be taxed were "removed" from the premises and the tax thereon thereby became due and payable, which contention is denied by defendants.

Moreover, the attention of defendants has not been directed to any case heretofore decided by any Court, involving this point at issue herein. In all cases involving the question as to whether a tax was due and payable under the above law by reason of a "removal" of distilled spirits from the distillery premises, or from a distillery warehouse, or fortification room or winery premises, it was established that the process of manufacture of the distilled spirits had been completed, the quantity distilled had been established by gauging or there had been a conscious removal of the distilled spirits therefrom, so that a compliance with the provisions of the above statutes was established; hence, as the distilled spirits were "removed" therefrom the tax became due and payable and it was proper for the Collector of Internal Revenue to assess and levy a tax thereon.

In the instant case, there is no evidence of any "removal" of the distilled spirits from the distillery to any other place, such as a distillery, warehouse, fortification or cistern room, or to winery premises after fortification of wine.

II.

THAT ALL TAXES DUE AND PAYABLE UPON ALL DISTILLED SPIRITS "REMOVED" FROM THE DISTILLERY PREMISES WERE PAID.

Defendants contend (R. 25, 32) that all taxes due and payable upon all distilled spirits "removed" from the distillery premises were paid and deny that they are indebted to plaintiff in any sum whatsoever, which denial is not controverted nor was evidence introduced to refute this denial of indebtedness.

Unlike the usual tax case, where the taxpayer must prove his right to recover a tax paid from the government, in this case, as the government seeks to recover a tax alleged to be due from the defendants, as principal and surety respectively, the government must prove, by sufficient evidence, legally admissible and legally admitted in evidence, that the tax sought to be collected is due and payable; in other words, the government plaintiff, rather than the taxpayer and his surety, have the burden of proof and must prove its case.

Freeman v. U. S., 1907, 157 Fed. 195;

U. S. v. Sisk, 176 Fed. 885;

U. S. v. Rindskopf, 105 U. S. 418, 26 L. Ed. 1131.

Consequently, it was incumbent upon plaintiff to show and prove that all of the alleged facts, not admitted in the amended answer or by oral stipulation were true.

Therefore, the burden was upon plaintiff to establish that the alleged quantity of distilled spirits, or a

lesser or greater sum, or none at all, was distilled at the time and place mentioned; also, that such distilled spirits were removed from the distillery in the quantity alleged on the date stated, and that there was a tax due thereon, in the amount alleged, or other sum, which tax or taxes were then due and payable; further, that the tax levied and assessed was so levied and assessed "in compliance with law".

It is submitted that the trial record establishes clearly the failure of plaintiff to sustain this burden of proof; hence, defendants were entitled to have judgment entered in their favor.

III.

THAT ANY TAX, OTHERWISE DUE AND PAYABLE, MUST BE ABATED OR REFUNDED AS THE LOSS OF THE DISTILLED SPIRITS WAS IN AND ON THE DISTILLERY PREMISES, AND EVEN IF REMOVED THEREFROM, MUST BE ABATED BECAUSE OCCASIONED BY A CASUALTY WITHOUT ANY FRAUD, COLLUSION OR NEGLIGENCE OF THE OWNER THEREOF.

Assuming for purposes of argument only, but not granting, that the distilled spirits, in the quantity alleged in the complaint, was "removed" from the distillery, then, in the absence of evidence establishing that such "removal" was not occasioned by a casualty and did occur through fraud, collusion or negligence of the owner thereof, defendants were entitled to judgment, in view of the express provisions of Chapter 26, of the *Internal Revenue Code*, Section 2901(b) which reads as follows:

“Accidental Fire or Other Casualty.—The Secretary, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use while stored in the fortifying room on the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated.”

which statute was set forth as an affirmative defense (R. 25-32) in defendants’ amended answer to plaintiff’s causes of action wherein defendants alleged (R. 32) that neither had been indemnified or recompensed for such loss to date from any persons whomsoever.

In order to clearly interpret the above statute it should be read in connection with the entire statute of which it is but a part, namely, Chapter 26 of the *Internal Revenue Code*, wherein, under other sections of the same statute, a distinction is made between an “owner” (Sec. 2901(b), 2903, 2874, 2885, 3180) or a “person legally accountable” (Sec. 2901(c)), a “wine

maker or his agent" (Sec. 3031(b)), a "distiller or importer" (Sec. 2800(a) (1)); a "rectifier or other dealer" (Sec. 2801(b)), a "distiller or rectifier" (Sec. 2812, 2828); a "person" (Sec. 2803, 2806, 2809, 2810, 2811, 2818, 2819, 2821, 2842, 2843, 2856, 2867-2870, 2876, 2885, 2908, 2909, 2913, 3072, 3100); a "rectifier" (Sec. 2813, 2855); a "distiller" (Sec. 2814(a) (2), 2815, 2844, 2845-2851, 2904); a "distiller and person" (Sec. 2816); any "person, firm or corporation" (Sec. 2817, 3152); an "officer, agent or person" (Sec. 2817); an "owner, agent or superintendent" (Sec. 2820, 3150(b) (1), 3157, 3159); a "distiller or his workmen or any person in his employ" (Sec. 2827); a "distiller, rectifier or wholesale liquor dealer and every person who works in any distillery, rectifying establishment or wholesale liquor store" (Sec. 2831); "distiller or person employed" (Sec. 2838); "agent or owner" (Sec. 2841); a "rectifier and wholesale liquor dealer" (Sec. 2854, 2857); a "distiller as a wholesale dealer" (Sec. 2859); a "rectifier or wholesale or retail liquor dealer" (Sec. 2860); a "rectifier or wholesale liquor dealer" (Sec. 2865); a "railroad company, transportation company or person" (Sec. 2866); "owner or owners" (Sec. 2886); "exporter or owner" (Sec. 2886); "distiller, owner, exporter, carrier or their agents or employees" (Sec. 2889, 2891); "distiller or warehouse man" (Sec. 2901); "distiller or owner" (Sec. 2903); "producer" (Sec. 3030, 3031, 3033, 3040); "wine maker or his agents" (Sec. 3031(b) (1)); "wine maker" (Sec. 3035); "distiller, manufacturer, dealer and all other

persons'' (Sec. 3070); ''manufacturer'' (Sec. 3073, 3114, 3177, 3179); ''no one'' (Sec. 3114); ''consignee, agent or employee'' (Sec. 3114(d)); ''whoever'' (Sec. 3115); ''commissioner, his assistants, agents and inspectors'' (Sec. 3117); ''commissioner, assistants, agents, inspectors and all other officers, employees and agents'' (Sec. 3121); ''brewer, seller and purchaser'' (Sec. 3150(b) (2)); ''brewer'' (Sec. 3153, 3154, 3155, 3158); ''retail dealer or other person'' (Sec. 3159(f)); ''person other than the purchaser or owner, or person acting on his behalf or his agent'' (Sec. 3159(i)); ''commissioner, his assistants, agents or employees'' (Sec. 3170); ''exporter'' (Sec. 3179).

It is apparent from the foregoing terms used in the statute relating to liquor that Congress intended to distinguish between these individuals and to confine the use of the terms to their ordinarily accepted meaning; otherwise, in this same statute (Sec. 3173(b) (4)), they have specifically defined the term as used in the specific section of the statute, wherein the statute provides—

''The term 'person' as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.''

An ''owner'' is one who has the legal title, or right to possession of a thing. This is the common accepted definition of the word. The term ''owner'', in view of qualifying terms used in other sections of the same

statute, cannot be held to include “agents” and “employees”, nor can their negligence be imputed to the “owner”.

It must be remembered that this statute was a remedial statute designed and intended to give relief to an “owner”. Had Congress desired to restrict the remedy or relief afforded under the statute, it could have done so, as it did in other sections of the same statute.

In construing any statute, reference must be made to the entire statute rather than to a particular provision or paragraph thereof, in order that the full intention and purpose of a statute may be properly determined and construed. *U. S. v. 99 Diamonds*, 129 Fed. 961, 965; 72 C.C.A. 9, 13; 2 L.R.A. (N.S.) 185.

Consequently, as Section 3221 of the Revised Statutes, as amended, otherwise known as Section 2901 of the U.S.C.A. Title 26, is but one part of said statute, reference must be made to the entire statute in order to ascertain whether the word “owner” is intended to include any person other than the one having title or possession of a thing.

That the word “owner” is intended to mean only the one who has the legal title or right to possession of a thing is self-evident by referring to other sections of this particular statute.

For example, Section 2889 authorizes an allowance to be made “for leakage or loss by an unavoidable accident and without any fraud or negligence of the distiller, owner, exporter, or their agents and em-

ployees occurring during transportation from an Internal Revenue Bonded Warehouse to the Port of Export, nor shall any assessment be collected for such loss or leakage.”

Further, under Section 2891(b) of the *Internal Revenue Code*, “Where spirits are withdrawn from warehouses, under the provisions of this chapter, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the Commissioner, with the approval of the Secretary, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the distiller, owner, exporter, carrier, or their agents or employees, occurring during transportation from an internal revenue bonded warehouse to a manufacturing warehouse.”

It would be illogical to conclude otherwise than that Congress intended to use the word “owner” in its restricted, rather than in its general sense, by the use of qualifying terms in the foregoing provisions of the same statute.

In using the words “distiller”, “owner”, “exporter”, “carrier”, “winemaker” or “person legally accountable” or their “agents or employees”, separately and together, Congress must have intended each word or group of such words to have a special meaning. And having referred to these individuals specifically, in several instances, and having included their agents or employees therein in one case and not in another in the same statute, it is obvious that it would be a strained construction of the statute to hold

that the negligence of an agent or employee can be imputed to an owner in one paragraph of the statute where the term "owner" is not modified by the phrase used in other sections of the statute, namely "or his agents and employees".

Had Congress intended to impute the negligence of an employee or agent to the owner, it could and would have said so as it did in the other sections in the statute referred to.

It must be remembered that this statute is a remedial statute and that it is intended to relieve a particular person from a burden to which he is otherwise subject.

Therefore, if there is no fraud, collusion or negligence on the part of the owner, and as the loss resulted from a casualty, the owner is entitled to allowance and deduction regardless of any negligence of any of his agents or employees, so long as the owner did not knowingly and actively participate in the wrongdoing. Had such been the case, then such fraud or collusion would prevent a recovery on the part of the owner.

Casualty.

Generally speaking, unless otherwise restricted specifically, a "casualty" is that which happens without design or without being foreseen. 129 Ky. 477. 112 S.W. 602.

The term "casualty" when used generally, without restriction, in statutes has been held to include per-

sonal illness and automobile accidents even though caused by intentional or negligent personal act.

For example, under the Hours of Service Act, it was held by the Court, in *United States v. Delano*, 1917, 246 Fed. 107, that the illness of an employee, even if resulting from over-indulgence due to the voluntary act and participation therein of the employee, was a "casualty".

Likewise, under the Revenue Act of 1934, authorizing an income tax deduction for losses arising from fires, storms, shipwreck or other casualty, it has been held that an automobile accident is a "casualty" within the meaning of such income tax statute. Revenue Act of 1934, paragraph 23(e) (3), 26 U.S.C.A. paragraph 23(E) (3) *Helvering v. Owens*, C.C.A. 2, 95 Fed. (2d) 318, 319.

The word "casualty" according to the Century Dictionary, means, "happening or coming to pass without apparent cause, without design on the part of the agent, in an unaccountable manner, or as a mere coincidence or accident; coming by chance; accident; fortuitous; indeterminate, as a casual encounter.

The foregoing definition is quoted with approval by the Court in *United States v. New York O. & W. Railway Co.*, 1914, 216 Fed. 702, 705. The Court then states:

" 'Casualty' is defined by the same authority as 'chance or whatever happens by chance, accident, contingency'. An unfortunate chance or accident, especially one resulting in bodily injuries or death. Specifically, disability or loss of life in battle or military service wounds" etc.

Black's Law Dictionary defines a "casualty" as "change; accident; contingency; also that which comes without design or without being foreseen." *Morris & Co. v. Industrial Board of Illinois*, 284 Ill. 67, 119 N.E. 944, L.R.A. 1918 E, 919; *Bennett v. Howard*, 175 Ky. 797; 195 S.W. 117, 118, L.R.A. 1917 E, 1075.

Webster's International Dictionary Second Edition, Unabridged, 1934, defines "casualty" as "(1) chance; accident, contingency; also that which comes without design or without being foreseen; an accident; losses that befall them by mere casualty. Raleigh;" (2) An unfortunate occurrence; a mischance; a mishap; a serious or fatal accident, a disaster".

This same authority defines "mishap" as "(1) ill luck, misfortune; (2) an injurious or unfortunate accident". The synonym "misfortune" is defined as "To happen unluckily or unfortunately; to suffer misfortune." "Misfortune" is defined further as "(1) Bad fortune or luck; calamity; an evil accident; disaster; mishap; mischance." "Accident" is defined by this same authority, as "an event that takes place without one's foresight or expectation; an undesigned, strange and unexpected event. Hence, often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty".

According to Funk & Wagnalls Practical Standard Dictionary, a "casualty" is "A contingency or accident, especially a harmful accident; also a chance occurrence; in war, losses arising from any cause."

This authority defines “casualty” as occurring by chance, accidental, unusual, occurring at irregular intervals or occasional.

In *Easton v. Glendeman*, 33 Idaho, 389, 195 Pac. 90, 91, the Court states:

“Casualty is a word of quite frequent use; yet, it cannot be said that its definition has been very accurately settled by the Courts. It has been said that strictly and literally the word ‘casualty’ is limited to injuries which arise solely from accidents, without any element of conscious human design or intentional human agency; something not to be foreseen or guarded against, something that happens not in the usual course of events. The word “casualty” being synonymous with accident; an accident.”

Under the Hours of Service Act, certain penalties are imposed for violation of the provisions of the Act, unless such acts fall within an exception thereto which provides

“provided that the provisions of the Act shall not apply in any case of casualty or unavoidable accident or an Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and could not have foreseen”. *U. S. v. Penn Co.*, 1917, 239 Fed. 741.

In considering the meaning of the word “casualty” the Court says:

“It should not be assumed that any terms used by Congress in the proviso are synonymous.”

“All words of an Act have a proper place and meaning therein, unless the contrary plainly appears.”

“In the proviso under consideration ‘casualty’ means a fortuitous happening caused by some human agency which the carrier cannot control.

“ ‘Unavoidable’ accident means a fortuitous happening caused by some human agency over which the carrier may have some control, yet which could not have been prevented by the exercise of due care.

“Words of the proviso do not plainly express such intention. If thus intended, Congress would have expressed such meaning in no uncertain terms * * *”.

As indicated in the *Helvering v. Owens* case, ante, and as expressly stated in *United States v. Delano*, 1917, 246 Fed. 107, a “casualty” may arise even though the human agency participated therein by his own action and conduct.

It is apparent, from the foregoing definitions and decisions, that the loss of the brandy in the instant case was due to a “casualty” arising out of an accident which came without design or without being foreseen and that the event took place without foresight or expectation, being an unforeseen, and unexpected event of an unfortunate character resulting in injury and damage to a thing, in short, an injury resulted which arose solely from an accident without any element of conscious human design or intentional human agency.

“Casualty”, within the meaning of the *Internal Revenue Law*, authorizing the deduction of such loss in computing net income, means an event due to accident, unexpected or an unusual cause, *Matthewson v. Com. of Int. Rev.* 1931, 54 Fed. 201, 537.

“The term ‘casualty’ expresses the measure rather than the cause of damage, that is the wreck itself rather than the storm, or negligence or fault of some person, so the ‘other’ casualty is at least as clearly *ejusdem generis* with shipwreck as with fire or storm”, stated the Court in *Shearer v. Anderson*, 16 Fed. (2d) 995.

Construction of tax statutes.

It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers.

Burnet v. Niagara Falls Brewing Co., 282 U.S. 648, 654.

See also, *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 508, where the Court said in part:

“It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of the taxpayers”.

Moreover, revenue and tax statutes must be construed strictly.

U. S. Wigglesworth, 2 Story (U.S.) 369, 373;

Rice v. U. S., 53 Fed. 910;

Powers v. Barney, 5 Blatchf. (U.S.) 202, 203;
U. S. v. Watts, 1 Bond (U.S.) 580, 583;
U. S. v. Freed, 225 U.S. 257, 68 L. ed. 617;
Gould v. Gould, 245 U.S. 151;
Ebersole v. McGrath, 271 Fed. 995.

Nor are the provisions of laws imposing taxes to be extended by implication, which rule of law the District Court failed to follow in the instant matter.

Gould v. Gould, ante;
U. S. v. Field, 255 U.S. 257.

Where the language of a tax statute is ambiguous the Court adopts the construction which is most favorable to the taxpayer. Also, if there is any doubt as to the connotation of a term and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer.

Gould v. Gould, ante;
United States v. Merriam, 263 U. S. 179;
Old Colony R. Co. v. Commissioner (1932), 284 U. S. 552;
Bowers v. Lighterage Co., 273 U.S. 346;
United States v. Updike, 281 U.S. 489;
Burnet v. Niagara Falls Brewing Co., ante.

Language used in tax statutes should be read in its ordinary and natural sense.

Helvering v. San Joaquin Co., 297 U.S. 496, 499;
Old Colony R. Co. v. Commissioner, ante.

Congress may well be supposed to have used language in accordance with the common understanding, and words in their known and ordinary signification.

Union Pacific R. Co. v. Hall, 91 U.S. 343, 347;

Old Colony R. Co. v. Commissioner, ante, 560.

The popular or received import of words furnishes the general rule for the interpretation of public laws.

Maillard v. Lawrence, 16 How. 251, 261;

Old Colony R. Co. v. Commissioner, ante;

Woolford Realty Co. v. Rose, 286 U.S. 319, 327;

United States v. Kirby Lumber Co., 284 U.S.

1, 3;

United States v. Buffalo Gas Fuel Co., 172

U.S. 339, 341;

Caminetti v. United States, 242 U.S. 470, 485;

U. S. v. First Nat. Bank, 234 U.S. 245, 258.

Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be engendered by any other ruling.

Woolford Realty Co. v. Rose, ante.

In the interpretation of tax statutes words should be “given their commonly accepted import”. Congress may well be supposed to have used language in the popular sense according to common understanding and commercial designation.

United States v. Kirby Lumber Co., ante;

United States v. Buffalo Gas Fuel Co., ante,
341.

As was said in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370

“the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.”

Old Colony R. Co. v. Commissioner, ante.

In seeking the intent of Congress the first consideration is the natural, ordinary and generally understood meaning of the term used.

United States v. Fisher, 2 Cr. 348;

Lake County v. Rollins, 130 U.S. 662;

Maillard v. Lawrence, ante;

United States v. Pacific Ry. Co., 91 U.S. 72.

The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain, and admits of no more than one meaning the sole function of the Courts is to enforce it according to its terms, as the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Caminetti v. United States, ante;

Lake County v. Rollins, ante, 670, 671;

Hamilton v. Rathbone, 175 U. S. 414, 421.

It is the province of the Court to enforce, not to make the laws; hence the Court is not at liberty to amend the statute or read words into it to make it conform to what the Court may believe to be the spirit of the act or to escape the injustice of law.

Maxwell v. Moore, 22 How. 185;

United States v. Goldenberg, 168 U. S. 95;

Hobbs v. McLean, 117 U. S. 567;

United States v. First Nat. Bank, ante, 245, 260;
St. Louis v. Taylor, 210 U. S. 281;
Caminetti v. U. S., ante.

Where Congress has by apt terms created a class or drawn distinctions between classes of persons (i.e. distiller, producer, etc.) or objects, it is not competent for the Court to extend or limit the operation of the statute.

United States v. Colorado Co., 157 Fed. 321;
United States v. Goldenberg, ante, 102;
Maxwell v. Moore, ante, 191;
Tiger v. Western Inv. Co., 221 U. S. 286.

A dispute over the meaning of a statute does not of itself show an ambiguity in the Act.

Nor. Pac. Ry. Co. v. Sanders, 47 Fed. 610;
Shreve v. Chusman, 69 Fed. 789;
Webber v. St. Paul City Ry. Co., 97 Fed. 140;
Swartz v. Siegel, 117 Fed. 13.

Subsequent experience is no guide to interpretation.

United States v. Un. Pac. Ry. Co., 91 U. S. 72;
Platt v. Pacific Ry. Co., 99 U. S. 48.

Therefore, it is submitted that it is apparent from the entire liquor statute that the term "owner" was intended to refer solely and exclusively to one holding the legal title to the distilled spirits and not to his officers, agents, servants, employees or any other person whomsoever; otherwise, such inclusion would have been made by Congress in such statute.

Moreover, as the burden of proof was upon plaintiff to establish another construction or intention on the

part of Congress so as to include within the definition of the word "owner" the other individuals expressly enumerated in other sections of the same statute, the failure of plaintiff to do so entitles defendants to the construction of the term "owner" defined herein; hence, as there is no evidence of any "fraud, collusion or negligence of the owner" of the distilled spirits, namely, defendant Livermore Winery Incorporated, and as even certain of the exhibits introduced by plaintiff indicate thereon that the loss claimed was due to a "casualty" any tax otherwise due and payable, must be abated and judgment entered in favor of the defendants herein. (Plaintiff's Exhibit 1(b), R. 112.)

IV.

THAT A COMPLIANCE WITH LAW, IN CONNECTION WITH THE
LEVY AND ASSESSMENT OF THE ALLEGED TAX, WAS NOT
ESTABLISHED.

As previously pointed out, there being no "removal" of the distilled spirits, the attempted levy and assessment of the alleged tax was premature and unauthorized under the statutes. Likewise, for reasons that follow, there was no evidence admitted legally upon the trial to sustain the contention of plaintiff that the levy and assessment was "in compliance with law" or the statutes authorizing the same.

In fact, the only witness who testified in this connection impliedly admitted that she did not know the signature of the Commissioner of Internal Revenue in Washington, D. C. (R. 68, 71) by this answer to a

question: "A. Well, it is the signature which our office accepts as being his signature." Further, the District Court over the objection of the defendants, permitted to be introduced in evidence, as Plaintiff's Exhibit No. 5, a purported copy of the assessment certificate, supposedly certified by someone whose signature had not been identified, nor that he was the holder of the office of Commissioner of Internal Revenue at the time of the making of the certification thereon; also, that the said certified copy of the assessment certificate contained but a portion of the assessment list concerning which the witness offered evidence and testimony.

Moreover, in connection with Plaintiff's Exhibit No. 7, being a notice and demand for tax (R. 73-81), the witness answered "no" to the question (R. 80) "But these are not copies of the records that you sent out at the time, and it was not the practice to keep a copy?"; also, "Q. So you cannot testify at this time that these are copies as they purport to be, of the notices that actually were sent out at that time?" "A. No, they are not copies of the original notices."

It is conceded that had there been the foundation laid to establish that the assessment list offered in evidence was signed by the Commissioner of Internal Revenue, who was then duly qualified and acting as such at the time of such signature, and that such was his signature, and that it was on file in the office of the collector of internal revenue, that such original assessment list would be evidence of the assessment. (*U. S. v. Bristow*, C.C. Ky., 1884, 20 F. 378.) However, such

foundation had not been laid at the time that the District Court permitted, over defendants' objection and motion to strike thereafter, the introduction of that which was not even the purported original assessment list, but merely what purported to be a photostatic copy of but a portion of it.

As the laws of evidence of the State of California are applicable in this case, attention is called to Section 1918, subdivision 9, of the California Code of Civil Procedure, which provides that documents of departments of the United States government may be proved by the certificates of the legal custodians thereof. Hence, it is necessary to establish who the legal custodian of the document was before it may be proved, which was not done nor was there any evidence as to who was the legal custodian of the assessment record. The above law authorizing the proving of documents of a department of the United States government must be distinguished from Section 1875 of the California Code of Civil Procedure, which restricts the right of a court in taking judicial notice of the private and official acts of the executive, legislative and judicial departments of the state and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states; and to the accession to office and the official signatures and seals of office of the principal officers of government in the executive, legislative and judicial departments of this state and of the United States. Accession to office may be established by an exemplification of a certificate of election or appointment duly certi-

fied by the keeper of the record. Here we have an appointment to office, rather than an accession to office, hence it was incumbent upon plaintiff to establish by evidence the appointment of the person designated on the assessment list to the office of Commissioner of Internal Revenue and that he held such office at the time of the execution of the assessment list; also, that it was signed by him; none of which was done.

It was error for the District Court to permit the witness for plaintiff to testify regarding the contents of a notice and demand for tax (Plaintiff's Exhibit No 7, R. 72-81) in view of the testimony of the witness that such exhibit was not a copy of the original or a duplicate original copy of the notice and demand for tax.

There can be no evidence of the contents of a writing, other than the writing itself, unless the original has been lost or destroyed, in which case proof of the loss or destruction must be made or when the original is in the possession of the person against whom the evidence is offered and he fails to produce it after reasonable notice. (*C. C. P.*, Sections 1855, 1937, 1938, et seq.)

In connection with Plaintiff's Exhibit No. 5 as the purported original copy of said exhibit bore other accounts and records thereon, including interlineations and penciled notations (R. 72), it was incumbent upon plaintiff to explain such alterations, interlineations, and notations in proffering the writing in evidence prior to its introduction therein, which was not done. (*C. C. P.*, Sections 1981, 1982.)

Therefore, no compliance with the law was legally established by plaintiff as to the assessment levied or demand for the tax in compliance with law.

V.

THAT THE QUANTITY OF DISTILLED SPIRITS PRODUCED, UPON WHICH THE TAX WAS ASSESSED, WAS NOT ESTABLISHED.

Upon the trial, the evidence introduced to establish the number of proof gallons of brandy distilled was uncertain, to say the least, as was the amount or proof of the brandy lost.

In this connection, it is most significant that plaintiff's witness admitted (R. 117) that he had not included in his computation, any distilling material or any brandy that might have been contained in the overflowing tank No. 1, having a capacity of 398.34 gallons the so-called over-flow tank having a capacity of 80 gallons and the singling tank having a capacity of 104 gallons, whereas a witness for defendant testified (R. 170, 171) that there were two distilling material tanks and two brandy receiving tanks located in the distilling premises, also, a singling tank, charging tank, and an overflow tank, making seven in all.

Moreover, plaintiff's witness admitted that he had sent a record to the Internal Revenue Department that the proof of the brandy contained in Tank No. 2 was 54 proof (R. 113) although he had previously testified (R. 105) that the proof of the spirits was about 55.

He was certain that he gauged the brandy but he would not say as to the exact proof (R. 113). When first examined, he testified (R. 96) "the brandy receiving Tank No. 2 was filled to capacity with liquid that was a mixture of brandy and water. Receiving Tank No. 1 was about half full of water. There was no evidence of alcohol in that, and the sump on the floor of the distillery contained a mixture of water and wine sediment and brandy, with some alcohol in it." Later (R. 118) he testified that the dirt floor of the distillery was damp, but admitted (R. 119) that neither he nor anyone else, to his knowledge, had made a test to determine whether there was any brandy there. Later upon direct examination (R. 104, 105) and upon cross-examination (R. 113) this witness stated that the proof of the brandy in Tank No. 1 was 20 proof gallons; also that there was only one sump containing liquid (R. 119), although after refreshing his recollection by reference to the plans of the winery he stated (R. 129) that there were two sumps separated by a concrete wall with an inter-connecting pipe-line, at which time defendants requested that he produce the plans of the winery in order to establish or contradict the information furnished by the witness (R. 130).

Plaintiff's Exhibit No. 5 (R. 20-21) purports to be a demand upon defendants for payment of taxes appearing upon the assessment roll of the District, namely, "tax assessed on 1619.56 proof gallons of brandy lost through negligence on Fruit Distillery Premises No. 306 on Dec. 26, 1936, @ \$2.00 per gallon, which appears on Collector's March 1937 List, page

504/2 \$3,239.00, together with penalties as prescribed by law and together with interest thereon until paid as provided by law''. On the other hand, the assessment certificate, Plaintiff's Exhibit No. 1 (R. 10-13), shows that the tax was on 1619.56 pg Bdy (Lost through negligence), 12-26 and 27-36.

A witness for defendants (R. 170-177) testified regarding the number of tanks in the distilling premises and the capacity thereof and the use and operation of these tanks, from which it is evident that in the absence of the gauging of the distilling material and brandy in these tanks and sump by the gauger for plaintiff, it would be absolutely impossible to ascertain and determine the quantity of distilling material, distilled spirits or brandy in the distilling premises on either December 26, 27 or 28, 1936; hence, the quantity of distilled spirits produced upon which the tax was assessed was not established by the evidence nor did plaintiff sustain the burden of proof in this connection.

VI.

THAT THE DISTRICT COURT ERRED IN ADMITTING EXHIBITS WITHOUT PROPER FOUNDATION HAVING FIRST BEEN ESTABLISHED THEREFOR.

Reference to the foregoing arguments is made in support of the conclusion that the District Court erred in admitting exhibits without proper foundation having first been established therefor.

VII.

THAT THE DISTRICT COURT ERRED IN REFUSING TO ORDER THE PRODUCTION OF THE DISTILLERY PLANS FOR THE PURPOSE OF CROSS-EXAMINATION OF A WITNESS WHO HAD TESTIFIED REGARDING THE OPERATION OF THE DISTILLERY INCLUDED THEREIN.

In view of the testimony of the witness for plaintiff that he was on the distillery premises on December 28 (R. 93), the fact that his testimony was objected to on the ground that he had not been qualified as an expert (R. 100) but which testimony was admitted by the Court over the objection of defendants as the witness said that he was familiar with the general situation at the distillery and had made an examination of the still at that time and both before and since (R. 100) although on cross-examination he stated: A. I do not think I said I was entirely familiar with the distilling premises. I was not familiar with the winery and distillery, and so far as I know that was no more than the second time I visited the premises". (R. 127), as well as the further fact that he was permitted to testify regarding the distillery premises and its operation (R. 115 et seq.), defendants were entitled to have the plans, upon which his testimony was based, produced and made available for purposes of cross-examining him in order to establish his credibility or lack of credibility as an expert witness.

As it was apparent that the witness had refreshed his memory by reference to these plans (R. 128), defendants were entitled to have these plans produced for purposes of cross-examination (C. C. P. 2047) and it was error to refuse this request.

VIII.

THAT THE DISTRICT COURT ERRED IN ADMITTING HEARSAY
EVIDENCE WHICH WAS NO PART OF THE RES GESTAE.

Over the objection of defendants, a witness of plaintiff was permitted to testify regarding a purported conversation that occurred allegedly on the morning of December 28, 1936, around 10:00 A.M. with one Joe Renteria (R. 96 et seq.) over the objections of defendants that no foundation had been laid for the introduction of such evidence.

It is admitted that even though this witness then testified that "Practically the same conversation was held later in Mr. Groci's presence", such conversation ostensibly having been repeated by Joe Renteria again, that all such conversation was hearsay and not a part of the res gestae in that all such asserted statements or declarations were made an appreciable time after the accident and resulting loss had occurred.

As is pointed out in *Williard v. Valley Gas & Fuel Co.*, 171, Cal. 9, such a statement was not part of the res gestae and should have been excluded because relating to something that had previously occurred and not while the accident was occurring. (*Innis v. Steamer Senator*, 1 Cal. 459; *Williams v. S. P. Co.*, 133 Cal. 550; *Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 700; *Bandy v. Sierra Lumber Co.*, 149 Cal. 772; *Kimic v. San Jose*, 156 Cal. 379; *Burgeser v. Bullocks*, 190 Cal. 673; *Cal. Juris.*, Vol. 10, p. 1115, Sec. 343)

IX.

THAT, AS THE INFORMATION CONTAINED IN PLAINTIFF'S EXHIBIT NO. 4 WAS ESTABLISHED TO HAVE BEEN BASED UPON INCORRECT INFORMATION SUPPLIED BY PLAINTIFF, IT WAS ERROR FOR THE DISTRICT COURT TO ADMIT SUCH EXHIBIT IN EVIDENCE.

Over the objection of defendants, the Court permitted witnesses for plaintiff to testify regarding plaintiff's Exhibit No. 4 (R. 65, 82-83, 85-96) and to admit said Exhibit No. 4 in evidence over the objections of defendants and denied the defendants' motion to strike said exhibit from evidence after defendants' witness G. B. Antonini had testified (R. 145-160) that the information therein contained had been furnished to him by plaintiff's employee and witness A. F. Bulfinch, also, that he did not know who dictated or typed the letter although he signed it after he was told to do so (R. 156) and he believed the information to be true when he signed it as it was represented to him that way. However, he testified (R. 148) that his duties with respect to the Livermore Winery were in San Francisco and that he was not at the winery on December 26, 27, 28 or 29, and that he was not familiar with the situation at all (R. 150). Further, he testified that he did not authorize anybody to dictate the letter for him (R. 151) but that he signed it upon the advice of Mr. Mayhew (R. 152).

Under these circumstances, it was error for the Court to permit the introduction of plaintiff's Exhibit No. 4 in evidence and to deny defendants' motion to strike said exhibit from the evidence because

the statements therein contained were admittedly made in reliance and based upon incorrect information furnished to G. B. Antonini in connection with which he had no knowledge. (*Gulart v. Azevedo*, 62 Cal. App. 108, 113)

CONCLUSION.

In view of the law and the evidence defendants submit that the decision and judgment of the trial Court was erroneous in the particulars noted in the Specification of Errors and should be reversed and remanded to the District Court to enter Findings of Fact and Conclusions of Law in accordance with the evidence and the law covering the issues involved, issuing thereafter a judgment in conformity therewith in favor of defendants and against plaintiff together with costs of suit and appeal incurred in connection therewith.

Dated, San Francisco,
March 6, 1946.

ROBERT H. FOUKE,
HANS A. KRUGER,
ROBERT A. WERTSCH,
Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL (a Delaware
corporation), of Saint Paul, Minnesota,
and LIVERMORE WINERY, INCORPORATED
(a California corporation),

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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No. 11,145

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL (a Delaware
corporation), of Saint Paul, Minnesota,
and LIVERMORE WINERY, INCORPORATED
(a California corporation),

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

No previous opinion in this case has been rendered.

JURISDICTION.

This appeal involves federal distilled spirits taxes imposed by Section 600 of the Revenue Act of 1918, as amended, and a fruit distiller's bond given pursuant to Section 3260, Revised Statutes. The taxes

sued for, totaling \$3,239, were assessed by the Commissioner of Internal Revenue on 1,619.56 proof gallons of distilled spirits produced at Fruit Distillery No. 306, operated by the defendant Livermore Winery, Inc., and lost or removed therefrom without payment of the taxes on December 26 and 27, 1936. The bond was executed by Livermore Winery, Inc., as principal, and the Saint Paul Mercury-Indemnity Company of Saint Paul, as surety, on November 6, 1936, and by its terms covered the period from June 26, 1936, to April 30, 1937. The bond was conditioned upon the faithful compliance with the laws and regulations, the payment of penalties and fines, and payment of all taxes on brandy produced by the principal at the distillery. (R. 14-15.) Demand was made upon the taxpayer and the surety, who refused to pay the amount owing, and the United States filed this suit to recover. Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. This case was tried on December 19, 1944. (R. 63.) Judgment was entered for the Government March 28, 1944. (R. 40-41.) Within three months and on June 27, 1945, notice of appeal was filed (R. 49-50), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

1. Whether the evidence introduced at the trial is sufficient to support the findings of fact made by the District Court, that 1,619.56 proof gallons of brandy were removed from the brandy distillery within the

meaning of Section 600 of the Revenue Act of 1918, as amended.

2. Whether the loss of the brandy in question was caused by casualty within the meaning of Sections 3221 and 3223, Revised Statutes.

3. Whether the District Court erred in admitting evidence offered by the Government over the objections of the defendants, thus requiring a reversal of the judgment.

STATUTES INVOLVED.

The pertinent statutes will be found in the Appendix, *infra*, pages i-vi.

STATEMENT.

This is a suit brought by the United States against the Livermore Winery, Inc., and The Saint Paul Mercury-Indemnity Company of Saint Paul. The complaint sets forth two causes of action, the first seeking recovery from Livermore Winery, Inc., of distilled spirits taxes under Section 600 of the Revenue Act of 1918, as amended, in the sum of \$3,239, with penalty and interest incurred on 1,619.56 proof gallons of brandy lost on December 26 and 27, 1936, at \$2 per proof gallon. (R. 3-6.) The second cause of action seeks recovery of the same amount from both appellants under the fruit distiller's bond. (R. 7-10.)

The fruit distiller's bond was executed by the Livermore Winery, Inc., as principal, and The Saint Paul

Mercury-Indemnity Company of Saint Paul, as surety, on November 6, 1936 (R. 35), and by its terms covered the period from June 26, 1936, to April 30, 1937 (R. 14). The bond was conditioned to secure faithful compliance with the laws and regulations, payment of penalties and fines, and all taxes on brandy produced by the principal at the fruit distillery. (R. 15.)

On December 26, 1936, at about 11:50 P. M., one Joe Renteria, then employed as night distiller by Livermore Winery, Inc., attached a water hose to the distilling material line and opened the valve, thus turning water into the still to wash it. He failed to open the slop valve and left the premises without shutting off the water. As the still filled with water, there being no opening for egress, the water backed into the still column and into Receiving Tank No. 2. At the close of business on December 26, 1936, Receiving Tank No. 2 contained 1,854 wine gallons of 155 proof brandy or a total of 2,873.70 proof gallons of distilled brandy. (Pltf. Ex. 4 and R. 36.)

On the morning of December 27, 1936, an employee of the Livermore Winery, Inc., found Receiving Tank No. 2 overflowing with a mixture of brandy and water, and he shut off the water running into the still. Receiving Tank No. 2 on December 27, 1936, after the water was shut off, contained 2,159.1 wine gallons of water and brandy mixture of an alcoholic content of 51 proof, or a total of 1,101.4 proof gallons of brandy. Seven hundred and sixty-five gallons of a mixture of water and brandy was recovered from the distillery

material sump in the floor of the distillery, which had an alcoholic content of 20 proof, or a total of 153 proof gallons of brandy, thus making a grand total of 1,254.14 proof gallons of diluted brandy on hand December 27, 1936. (R. 37.)

In determining the quantity lost, the revenue agent deducted 1,254.14 proof gallons, the amount on hand December 27, 1936, from 2,873.70 proof gallons, the amount on hand at the close of business December 26, 1936, and found the loss to be 1,619.56 proof gallons. (R. 37.) Upon this amount the Commissioner entered an assessment of \$3,239 at \$2 per proof gallon. The District Court found this amount to have been lost through negligence (R. 38), and entered judgment for the Government. (R. 40-41.)

Demand was made upon Livermore Winery, Inc., by the Collector of Internal Revenue for payment of \$3,239 taxes on May 4 and May 15, 1937. (R. 38.) On May 25, 1939, demand was made upon both defendants (Pltf. Ex. 3), for the payment of \$3,239, together with penalties and interest. Upon a refusal to pay the amount due, this suit was filed.

SUMMARY OF ARGUMENT.

The assessment as made by the Commissioner, standing alone, makes out a *prima facie* case for the Government. Further, the assessment was supported by oral testimony. The loss of 1,619.56 gallons of brandy under the evidence constitutes a removal within the

meaning of Section 600 of the Revenue Act of 1918, as amended.

The record contains no evidence under which the District Court could hold that the loss was the result of a casualty. All the evidence explanatory of the loss shows negligence on the part of Joe Renteria, an employee of Livermore Winery, Inc., within the meaning of Sections 3221 and 3223, Revised Statutes. The documentary evidence, which was admitted by the Court over the appellants' objections, was properly received, since the certificate of assessment was certified under Section 882, Revised Statutes, as amended, and the other exhibits were acknowledged by proper officers of Livermore Winery, Inc. The statements of Joe Renteria to witness Bulfinch were made at the distillery in the presence of Guiseppe Groci, who was vice-president of the Livermore Winery, Inc., and superintendent of the distillery. Thus the statements of Renteria were made in the presence of Livermore Winery, Inc., and under Section 1870 of the California Civil Code of Procedure were admissible. In any event there is no showing of prejudicial error.

ARGUMENT.

I.

THE EVIDENCE IN THE RECORD SUPPORTS THE FINDINGS OF FACT MADE BY THE DISTRICT COURT.

The United States introduced in evidence a certified copy of the assessment certificate and list, together with the original and the amended monthly report,

Form 15, filed by the Livermore Winery, Inc., for December, 1936, and a letter in the form of an affidavit signed by G. B. Antonini, president of the Livermore Winery, Inc.

These instruments, together with the allegations set out in paragraph V of affirmative defenses alleged by defendants in their amended answer (R. 26-28) are sufficient proof to sustain the judgment.

The certificate of assessment and the assessment list standing alone make out a *prima facie* case of liability to the tax. In *Clifford v. Rothensies*, 46 F. Supp. 782 (E. D. Pa.), the Court said (p. 784):

In the case at bar, however, plaintiff has failed to show that there were bona fide tenants who were the real parties responsible for the diversion to beverage purposes of the distilled spirits found on his premises. The certificate of assessment in evidence creates a *prima facie* case of liability to the tax, *United States v. Rindskopf*, 105 U.S. 418, 26 L. Ed. 1131; *Western Express Co. v. United States*, 8 Cir., 141 F. 28, and plaintiff's evidence fails to establish that the tax was improperly assessed against him.

In *Western Express Co. v. United States*, 141 Fed. 28 (C.C.A. 8th), the Court said (p. 30):

The government was not required in the first instance to go further in the proofs than to submit the assessment list. 18 Int. Rev. Dec. 164 (Circuit Court, N. D., New York); *Delaware Railway Company v. Prettyman et al.*, Fed. Cas. No. 3,767 (Circuit Court, D. Delaware); *United States v. Rindskopf*, 105 U.S. 418-422, 26 L. Ed. 1131. When, therefore, the government presented the

assessment list, which is conceded to have been regular in form, and rested, it had made out a *prima facie* case. Without more, it was entitled to a verdict. It then developed upon the defendant below to rebut the case made by a preponderance of evidence. There was not only some evidence in the case to support the verdict, but when all the evidence which supervened is examined, it discloses many cumulative facts and circumstances, which, within the range of reasonable inference, tended to support the verdict.

The District Court in this case properly admitted the assessment, and unless the other evidence in the case refutes it the Government established a *prima facie* case which entitled it to judgment. *United States v. Rindskopf*, 105 U.S. 418.

The error under which appellants' counsel are laboring is presented quite clearly by the Eighth Circuit Court of Appeals in *Paschal v. Blieden*, 127 F. (2d) 398, by this language (p. 403):

It should be noted that the findings upon which the orders of the referee and the court expunging the claim are based do not seem to be predicated upon the testimony claimed to be in conflict with facts contained in the returns made by the collector, but the orders appear to be founded upon the erroneous view that the assessments are not presumptively correct and that as evidence they do not satisfy the burden of proof cast upon the collector.

The appellants are attempting to get this Court to say that the assessment is not presumptively correct,

and that as evidence it does not satisfy the burden of proof cast upon the Government. For support they cite *United States v. Rindskopf, supra*. This case supports the position of the Government rather than that of the appellants. In quoting from the *Rindskopf* case in *United States Fidelity & G. Co. v. United States*, 201 Fed. 91 (C.C.A. 2d), the Court said (p. 93):

He and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. * * *

Applying this principle to the instant case, the appellants have failed to impeach the assessment. They have failed to show that *no* distilled spirits were lost in the month of December, 1936, neither have they shown that a *lesser* quantity than 1,619.56 proof gallons were lost. If the quantity is to be reduced "in part" they must show to what extent. Having failed to show a lesser quantity, the amount of the assessment, and as found by the District Court, is correct.

The principle that the certificate of assessment makes out a *prima facie* case of the amount due is applicable to the surety on a bond as well as to the principal. *United States Fidelity & G. Co. v. United States, supra*; *United States v. Fidelity & Casualty Co.*, 115 F. (2d) 475 (C.C.A. 3d).

The appellants are attempting to make much of the fact that the distilled spirits in Tank No. 2 were not actually gauged on December 26, 1936. Under the

statute, no actual gauge would be made until the distilled spirits were removed from the premises. It is a far cry to say that the Commissioner cannot make an assessment where because of a loss an actual gauge could not be made. Under Section 3248, Revised Statutes (Appendix, *infra*), the tax attaches to distilled spirits as soon as it is in existence as such. *United States v. One Ford Coupe*, 272 U.S. 321; *United States Fidelity & Guaranty Co. v. United States*, 220 Fed. 592 (C.C.A. 4th); *Stein v. United States*, 81 F. (2d) 542 (C.C.A. 3d).

Section 3309, Revised Statutes, expressly provides:

If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof gallon; * * *

An assessment based upon an estimate is lawful. *United States v. United States Fidelity and Guaranty Co.*, 144 Fed. 866 (Conn.); *United States Fidelity & Guaranty Co. v. United States*, *supra*. Here the calculation is supported by information furnished by the distiller by letter (Pltf. Ex. 4) and on Form 15 (Pltf. Ex. 1). It corroborates the testimony of the Internal Revenue Inspector as to the amount of distilled spirits lost. The admissions made by the distiller are competent evidence against both appellants. *United States v. American Surety Co. of New York*, 56 F. (2d) 734

(C.C.A. 2d). All the evidence in the record substantiates the validity of the assessment and the facts as found by the District Court.

The evidence in the record shows a removal within the meaning of Section 600, Revenue Act of 1918. (Appendix, *infra*.) This Court, in *Rogan v. Conterno*, 132 F. (2d) 726, under a statute which provided that taxes should be payable when the wine was sold, or removed for consumption or sale, held that wine destroyed by fire on the premises was removed within the meaning of the statute. Under facts similar to those in this case, it has been held that the distilled spirits were removed and the distiller became liable for the taxes. *Joseph E. Seagram & Sons v. Smith*, 113 F. (2d) 357 (C.C.A. 7th); *Joseph E. Seagram & Sons v. United States*, 36 F. Supp. 1013 (C. Cls. 1941), certiorari denied, 314 U.S. 653.

The appellants having failed to impeach the Government's testimony, the judgment must stand.

II.

THE LOSS RESULTED FROM NEGLIGENCE AND NOT FROM A CASUALTY.

The uncontradicted evidence in the record shows that the loss of the distilled spirits was incurred through the overflow of Receiving Tank No. 2, and the overflow was caused through the acts of Joe Renteria who, at the time, was night distiller at the winery.

A corporation is liable for the acts of its agents when those acts come within the scope of the employment. *In re Mifflin Chemical Corp.*, 123 F. (2d) 311 (C.C.A. 3d).

The loss is alleged in paragraph 5 of the appellants' amended answer (R. 27), in this language:

That without the knowledge or consent of defendant, a *person unknown*, * * * caused a hose to be connected to and with the Livermore City Water system, * * * that thereafter a faucet was turned on by *persons unknown* to defendant, * * *. (Italics supplied.)

The only allegation denied by the appellants is that the person committing the act was an employee.

Even if the person performing these acts were not an employee of the appellant, Livermore Winery, Inc., the loss of the distilled spirits was not brought about by reason of a "casualty." In *Crystal Spring Distillery Co. v. Cox*, 49 Fed. 555 (C.C.A. 6th), the Court in defining "casualty" uses this language (p. 559):

We are clearly of the opinion that the court below was correct in its holding that "other casualty," as used in said section, meant an accidental destruction by some cause of like character and operation as fire; such as lightning, floods, cyclones, storms, or other uncontrollable force, which ordinary foresight and prudence could not guard against or prevent. The loss from undiscoverable wormholes, or the warping of barrels from excessive summer heat, causing greater evaporation of spirits, is not the destruction by "other casualty" contemplated by said section

3221, Rev. St. In *Welles v. Castles*, 3 Gray, 325, Chief Justice Bigelow, speaking for the court, says that “unavoidable casualty” signifies events or accidents which human prudence, foresight, and sagacity cannot prevent.

It will be noted that the definition of the word “casualty” as defined in the *Crystal Spring Distillery Company* case, *supra*, and as defined in *Welles v. Castles*, 3 Gray 325, from which the Court quoted, signifies an event which a human cannot prevent. In the instant case the event was caused by the acts of some person and, therefore, the loss was not the result of a casualty but of negligence.

Not only have the appellants failed to show loss through casualty, but on the contrary, the affidavit of G. B. Antonini, president of Livermore Winery, Inc., states specifically that Joe Renteria was the still operator and that the act was committed by him while engaged in the performance of his duties. It has been shown conclusively that the loss was incurred through the negligence of the distillery company.

III.

THE EVIDENCE ADMITTED OVER APPELLANTS' OBJECTIONS WAS PROPERLY RECEIVED.

The appellants contend that the Court erred in admitting in evidence the certified copy of the certificate of assessment, with the list attached. Section 882, Revised Statutes, as amended (*Appendix, infra*),

provides that records of an executive department of the United States shall be admissible as evidence of “any act, transaction, occurrence, or event as a memorandum of which such books, records, or minutes were kept or made.” This section provides “(c) The seal of any such executive department or corporation shall be judicially noticed.” The certified copy of the assessment bearing the seal of the Treasury Department made that document admissible without further identification or explanation, and the objections which the appellants have made against its admissibility are not well founded.

The Government offered in evidence an affidavit executed by G. B. Antonini, president of the Livermore Winery, Inc., to which the appellants objected, on the ground that no foundation had been laid showing that Antonini was the president of the company, or that it was executed pursuant to any authority as an officer of the company, and further that no showing was made that the affiant had actual knowledge as to the facts set forth in the letter. (R. 94.) The Court received this affidavit which has been referred to as a claim for the abatement of the tax, and the appellants now claim that the receipt of this document in evidence constitutes reversible error.

Section 1161 of the Civil Code of California (Appendix, *infra*), expressly provides that a written document acknowledged by the president of a corporation shall be recorded without further evidence, and Section 1940, California Code of Civil Procedure, pertaining to the admissibility of evidence, provides that:

“Any writing may be proved either: 1. By anyone who saw the writing executed; or, * * * 3. By subscribing witness.” The testimony of Arthur F. Bulfinch is to the effect that the instrument was prepared in the office of Mr. Mayhew, where the seal of the corporation was kept, that Mr. Antonini, president of Livermore Winery, Inc., signed and swore to it, and the seal of the corporation was placed upon the second page of the document in his presence. (R. 86.) This testimony satisfied the California statutes, and the document was admitted. (R. 95.)

G. B. Antonini was called as a witness for the appellants in an effort to show that at the time the affidavit was executed he had no personal knowledge of the facts. His testimony shows, however, that he did have information concerning the matter, which he got in Mr. Mayhew's office. (R. 149.) Mr. Groci was present (R. 87), and Mr. Antonini testified that Mr. Groci had told him something about it (R. 151). He testified further that he signed it on the advice of Mr. Mayhew (R. 152), and that he signed it as president of the company (R. 154). He testified further that Mr. Mayhew was paid for taking care of matters pertaining to the winery, particularly the making of reports. (R. 155.) He also stated that he knew what he was signing because he read the document, and that he had had some discussion with Mr. Mayhew about it. (R. 156.)

Mr. Bulfinch asked Mr. Antonini, before he signed the document, if the facts as therein stated were true and he answered, “Yes”. (R. 91.) Nowhere in the

record is there any testimony to show that the facts as stated in Mr. Antonini's affidavit are not true, and certainly if the statements were not correct it was the duty of the appellants to refute them. Having failed to refute the statements in the affidavit, the Court must consider them to be true. Clearly there was no error committed by the Court in receiving this document.

The contention is also made by the appellants that the Court erred in permitting Mr. Bulfinch to testify regarding statements made to him by Joe Renteria. (R. 99.)

Paragraph 1870 of the California Code of Civil Procedure, subparagraph 3, provides that an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto, are admissible in evidence. The statements of Joe Renteria, having been made in the presence of Mr. Groci, who was the vice-president of Livermore Winery, Inc. (R. 158), and who took care of the winery, were made in the presence of Livermore Winery, Inc., a party to this action, and were therefore admissible in evidence. *Woods v. Jensen*, 130 Calif. 200.

It has been held that statements made by a person while engaged in the performance of his official duties for a corporation, even though not made in the presence of the party, are admissible against the corporation. *Pan American Co. v. United States*, 273 U.S. 456; *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863 (C.C.A. 6th); *Southern Tel. & Tel. Co. v. Evans*, 54 Tex. Civ. App. 63; *Arizona Power Co. v. Kellam*, 13

Ariz. 291. It is respectfully submitted therefore that the declarations made by Joe Renteria, in explaining how the loss occurred, were admissible on direct examination of the Government's witness, and the Court did not commit error in allowing Mr. Bulfinch to relate them.

The District Court's refusal to order the production of the distillery plans was not error because it pertained to a collateral matter, and in our opinion it requires no further discussion.

The testimony of Margaret Wood that she sent out notice and demand for tax dated May 4, 1937, and May 15, 1937, to which no objection was made (R. 72-73), was sufficient to prove that demand for payment of the tax was made upon Livermore Winery, Inc. The evidence therefore supports finding of fact numbered 11 (R. 38), without regard to Plaintiff's Exhibit No. 7. Furthermore, under the bond, the principal and surety are liable for the tax, penalty and interest up to the full amount of the bond without demand. *Royal Indemnity Co. v. United States*, 313 U.S. 289; *Maryland Casualty Co. v. United States*, 76 F. (2d) 626 (C.C.A. 5th); *United States v. Maryland Casualty Co.*, 49 F. (2d) 556 (C.C.A. 7th). Demand was made on both appellants May 25, 1937, as evidenced by Plaintiff's Exhibit 3 received without objection. (R. 65.) The receipt in evidence of Exhibit No. 7 was therefore not reversible error.

The evidence objected to by the appellants having been properly admitted, there is substantial evidence in the record to support the findings of fact and con-

clusions of law as made by the District Court. When it appears that there is substantial evidence to support the findings, judicial review shall end. *Commissioner v. Scottish American Co.*, 323 U.S. 119; *Dobson v. Commissioner*, 320 U.S. 489.

CONCLUSION.

No reversible error having been committed by the District Court, and there being substantial evidence to support the findings, the judgment of the lower Court must be affirmed.

Dated, April 8, 1946.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 600 [as amended by Sec. 900 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sec. 710 of the Revenue Act of 1938, c. 289, 52 Stat. 447]. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

(4) On and after January 12, 1934, and until July 1, 1938, \$2.00, and on and after July 1, 1938, \$2.25, on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

* * * * *

Revised Statutes:

SEC. 882 [as amended by Sec. 6 of the Act of June 19, 1934, c. 653, 48 Stat. 1109]. (a) Copies of any books, records, papers, or other documents in any of the executive departments, or of any corporation all of the stock of which is beneficially owned by the United States, either directly or indirectly, shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department or corporation, respectively.

(b) Books or records of account in whatever form, and minutes (or portions thereof) of proceedings, of any such executive department or corporation, or copies of such books, records, or minutes authenticated under the seal of such department or corporation, shall be admissible as evidence of any act, transaction, occurrence, or event as a memorandum of which such books, records, or minutes were kept or made.

(c) The seal of any such executive department or corporation shall be judicially noticed.

SEC. 3221. The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any distillery warehouse, or bonded warehouse of the United States and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated.

SEC. 3223. When the owners of distilled spirits in the cases provided for by the two preceding sections may be indemnified against such tax by a valid claim of insurance, the tax shall not be remitted to the extent of such insurance.

SEC. 3247. Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller.

SEC. 3248. Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

SEC. 3253. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall at any time, when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall

not exclude any other remedy or proceeding provided by law.

SEC. 3254. All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

SEC. 3303. Every person who makes or distills spirits, or owns any still, boiler, or other vessel used for the purpose of distilling spirits, or who has such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or who uses any such still, boiler, or other vessel, shall from day to day make, or cause to be made, in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, a true and exact entry of the kind of materials, and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling-apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose

of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, of the time when any fermenting-tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold.

SEC. 3307. On the first day of each month, or within five days thereafter, every distiller shall render to the collector of the district an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine-gallons and of proof-gallons of spirits produced and placed in warehouse. And the distiller or the principal manager of the distillery shall make and subscribe the following oath, to be attached to said return: "I,....., distiller (or principal manager, as the case may be) of the distillery at....., do solemnly swear that, since the date of the last return of the business of said distillery, dated.....day of.....today of....., both inclusive, there was produced in said distillery, and withdrawn and placed

in warehouse, the number of wine-gallons and proof-gallons of spirits; and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials respectively hereinbefore specified, and no more." One of the said duplicate returns shall be transmitted by the collector to the Commissioner of Internal Revenue.

Civil Code of California (1937):

SEC. 1161. *Acknowledgment or proof by subscribing witness, and certification thereof, prerequisite to recordation.* Before an instrument can be recorded, unless it belongs to the class provided for in either section eleven hundred and fifty-nine, eleven hundred and sixty, twelve hundred and two, or twelve hundred and three, its execution must be acknowledged by the person executing it, or if person executing the same on behalf of the corporation, or proved by a subscribing witness, or as provided in sections eleven hundred and ninety-eight and eleven hundred and ninety-nine, and the acknowledgment or proof certified in the manner prescribed by article three of this chapter. [Enacted 1872; Amended by Code Amdts. 1873-74, p. 226; Stats. 1905, p. 602.]

No. 11,145

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY
COMPANY OF SAINT PAUL, a Delaware
Corporation of Saint Paul, Minnesota,
and LIVERMORE WINERY, INCORPORATED,
a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

MAY 22 1946

PAUL P. O'HANLEN,
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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

ISSUES INVOLVED.

It is apparent from the reply brief for appellee that, in general, there is an agreement between the parties to this action as to the statutes involved, but that the parties do not agree entirely as to the facts, nor proof of such facts, nor the construction and application of the statutes involved in relation to the facts admitted or those found by the District Court below.

AGREED FACTS.

The complaint (R. 2-22) sets forth certain allegations, some of which are admitted in the amended answer to the complaint (R. 22-33), as to the applicable statutes and jurisdiction of the District Court.

However, other allegations of the complaint, including allegations of the removal of the distilled spirits from the distillery premises, and that any tax levied and assessed thereby became due and payable, or that such levy and assessment was in compliance with law, or that defendants were notified and demand for payment was made or was given, are all denied by defendants.

In this connection, a "Statement of the Case" is contained in the opening brief of appellants (pages 3-12), and the issues involved are stated therein. (pages 12-13.)

Appellants are aware of the decisions that the determination of the facts by a lower Court, where there is a conflict in evidence legally admitted, will be upheld on an appeal.

However, appellants submit that this situation does not exist in the present case.

STATUTES INVOLVED.

Reference is made to the transcript, appellants' opening brief, brief for the United States, Appendix (pages i-vi) and the Appendix infra (pages i-vii) for the pertinent statutes applicable to this case.

ISSUES PRESENTED.

It is the position of appellants that there was no evidence, legally admitted by the District Court, presented upon which the District Court could make a determination of the alleged facts set forth in the complaint.

Consequently, appellee failed to establish a cause of action within the purview of applicable statutes and decisions; hence, defendants were entitled to a judgment dismissing the instant action by the District Court.

Further, that assuming, but not granting, that a *prima facie* case was properly and legally presented by appellee, that appellee failed to sustain the burden of proof by the introduction of evidence controverting the issues raised by appellants establishing that there had not been a compliance with the applicable statutes as to the levy and assessment of the taxes involved or notices or demands given in accordance therewith, as required by statute and applicable decisions discussed hereafter.

Moreover, appellants contend that even if there was sufficient evidence, legally admitted before the District Court, from which that Court could and did make a determination of the facts, that such evidence established clearly that the loss of brandy resulted from a "*casualty*" and not from the negligence of the "*owner*"; hence, appellants were entitled to abatement of the tax and judgment under the applicable statutes making such abatement or remission of tax mandatory.

ARGUMENT.

I.

BURDEN OF PROOF WAS UPON APPELLEE TO ESTABLISH
FACTS ALLEGED IN THE COMPLAINT.

Reference is made to the opening brief for appellants and to the authorities cited therein in support of this statement.

In addition, it is conceded that in the event a certificate of assessment is legally and properly admitted in evidence, that such certificate of assessment creates a *prima facie* case of liability to the tax. (*United States v. Rindskopf*, 105 U.S. 418-422, 26 L. Ed. 1131.)

Appellants contend that such *prima facie* case was never made or established because the only evidence of the certificate of assessment was an asserted photostatic copy of but a portion of an unauthenticated assessment roll, which was improperly, and, over the objection of appellants, admitted in evidence.

Under revised statutes, Section 882 (as amended by Sec. 6 of the Act of June 19, 1934, c. 653, 48 Stat. 1109) referred to on pages i and ii of the Appendix in the reply brief of appellee, only a "copy" of a record, paper or other document of an executive department of the United States shall be admitted in evidence when duly authenticated under the seal of such department; although any book or record of account, *in whatever form*, and minutes (or portions thereof) of proceedings, of any such executive department are admissible as evidence of any act, transaction, occurrence or event.

COPY OFFERED NOT A TRUE COPY.

It should be noted that the purported copy of the assessment certificate (Plaintiff's Exhibit 5) was and is not a true and correct copy of said purported original certificate of assessment, in that said certificate contained therein and included thereon, penciled notations and memoranda on that portion of the certificate of assessment covered by the purported certified copy thereof, which was not included therein or thereon; also, that the original certificate of assessment contained many other items deemed to be relevant by appellants if properly admitted in evidence as to which an inquiry would have been made if properly admitted in evidence.

NO FOUNDATION LAID.

Moreover, appellants contend that the proper foundation was not laid, prior to the admission in evidence, of Plaintiff's Exhibit 6, as required under the above statute, to establish that the certificate of assessment was a book or record of account or minutes authenticated under the seal of the Treasury Department.

EXHIBIT 6 NOT IN EVIDENCE.

Further, reference is made to the transcript (R. 70-72) wherein appellee offered in evidence the purported original certificate of assessment and asked permission to withdraw it for the purpose of furnishing a photostatic copy to the appellants (defendants), which offer in evidence was objected to and not decided by the Court, whereupon appellee offered the

asserted certified copy of the certificate, which the Court stated (R. 72) “The Court: I will allow it to go in subject to your motion to strike and over your objection.” Then immediately following this statement, the reporter included in the transcript (R. 72) the following notation “(The certified copy of assessment certificate is marked plaintiff’s Exhibit 5 in evidence.)” which appears to be solely a deduction of the reporter that the original certificate of assessment was introduced in evidence over the objection made without a ruling thereon by the Court, as the Court said “it”, rather than “they” would be admitted over the objection in connection with the tender of the alleged certified copy.

Consequently, appellants contend that Plaintiff’s Exhibit 6 was not admitted in evidence, hence was not before the Court, and cannot be considered as evidence herein; also, that the exhibit in the form offered was not legally admissible under the above statute.

II.

BURDEN OF PROOF NOT SUSTAINED BY APPELLEE.

Assuming, but not granting, that Plaintiff’s Exhibits 5 and 6 were properly admitted in evidence, appellee failed to sustain the burden of proof that the tax was levied and assessed and notice and demand therefor made in the form and manner provided by law and under the statutes applicable thereto.

Moreover, appellee thereupon proceeded promptly to disprove its assumed "*prima facie*" case by showing that the assessment was made improperly and not based upon the actual quantity of brandy distilled or lost in the distillery premises. (Opening Brief for Appellants, pp. 38-41.)

As pointed out in the opening brief for appellants (pp. 38-40) appellee's witness contradicted himself as to the proof and quantity of the brandy, and admitted (R. 117), that he had not included in his computation any distilling material or brandy which might have been contained in the overflow tank No. 1 having capacity of 398.34 gallons, the so-called overflow tank having a capacity of 180 gallons and the singling tank having a capacity of 104 gallons; also (R. 119) that he had not made a test to determine whether or not there was any brandy in the liquid on the floor; or that there was any distilled material removed from the distillery premises, as no test to determine the same had been made. In spite of the fact that this witness indicated he was an expert and familiar with the premises, the manager of the corporation at the time testified positively as to the presence of these tanks on the premises and the fact that distilling material was contained therein. (R. 170 et seq.) Later this same witness for appellee admitted that he was not familiar with the winery and distillery (R. 127) and that it was no more than the second time that he had visited the premises so that his testimony was based on general knowledge of stills,

rather than a particular knowledge of the Livermore winery still.

In view of this conflict in the testimony of this particular witness and in order to establish the presence of the faucet installed upon the distilling material line in violation of law (26 U.S.C.A. Secs. 2816, 2832), and without the knowledge of defendant owner of the installation of said faucet, referred to in paragraph VI of defendant's amended answer, the Court erroneously, in the opinion of appellants, refused to require the production of the plans by said witness (R. 129) to establish one of the facts in controversy and to impeach the testimony of this witness.

Moreover, this particular fact became important in establishing that the loss of the brandy was not due to the negligence of defendant owner, but rather was occasioned by an act of an employee that did not occur within the course and scope of his employment with the knowledge and consent of defendant owner.

Further, as pointed out in the opening brief for appellants (p. 39), Plaintiff's Exhibit 5 purports to be a demand for payment of taxes for a loss occurring on December 26, 1936, whereas the assessment certificate, Plaintiff's Exhibit 1 (R. 10-13) shows the assessment of a tax for a loss on two days, namely, December 26 and 27, 1936, and the evidence of such loss according to appellee's witness related to but a partial test and report made by him on December 28, 1936.

As pointed out in *United States v. Rindskopf*, 105 U.S. 418, the Court finds as follows:

“The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; *but every material fact upon which his liability was asserted was open to contestation. The distiller and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the Commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment.* They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller’s liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due. The court, therefore, erred in instructing the jury that the assessment was to be taken and considered in its entirety, and that the Government was entitled to recover the exact amount assessed or not any sum. In other respects, the charge as given above correctly presents the law.

There may, undoubtedly, be cases where an assessment must stand as an entirety or not at all; as, where an erroneous rate has been adopted by the officer; or where it is impossible to separate from the property assessed, the part which is exempt from the tax; or where its validity depends upon the jurisdiction of the commissioner. The present case does not fall within either of these classes. Here the question is as to the

quantity of spirits produced on which taxes were not paid.”

Hence, had appellee properly established a *prima facie* case, with the proper introduction in evidence of the certificate of assessment, it was the duty of appellee to go forward with the proof and sustain the allegations of the complaint, by refutation of the evidence introduced by defendants, which appellee failed to do.

As in *United States v. Rindskopf*, the question presented in this case is as to the quantity of spirits produced on which taxes were not paid. It is submitted that in this case, the issue is as to whether the assessment must stand as an entirety or not at all. Having failed to establish a proper assessment or the quantity or proof of spirits distilled, or lost, or on which no tax had been paid already, appellee failed to sustain the burden of proof.

In the case of *Freeman v. United States*, 157 Fed. 195, cited by appellants but not referred to by appellee, where a comparable situation arose, the court stated at page 197, as follows:

“The government seeks to obtain a judgment against the distiller and his surety, and invokes the aid of the United States court for that purpose. It institutes a suit upon a bond which was executed by the distiller and his surety for the payment of any taxes that might be due by the distiller; and while the execution of the bond by the distiller and his surety is admitted, never-

theless it is still incumbent on the government to show that the distiller is indebted to the government for the amount claimed to be due for taxes on distilled spirits. Thus we have a well-defined issue as to whether the distiller is indebted to the government for taxes on distilled spirits. However, it is insisted by counsel for the government that the court is powerless to hear any evidence which the defendants may offer in relation to the issue thus raised. The distiller and his surety contend that the distiller is not indebted to the government, and in support of such contention it is averred that the spirits deposited in the warehouse were accidentally destroyed by fire, without any fraud, collusion, or negligence of the defendants. This is as complete a defense to the action, when proven or admitted, as the plea of payment could possibly be when proven or admitted. The statute expressly provides that no tax on spirits destroyed in this matter shall be collected. To hold that the distiller and his surety under such circumstances would not be entitled to assert a right thus conferred as a defense to such an action would be in utter disregard of the rights of the defendants below and would deprive them of their property without due process of law, as well as to deny them the equal protection of the laws.

It is admitted by counsel for the government that the spirits in question were accidentally destroyed by fire without any fraud, collusion, or negligence of the plaintiffs in error, and that the law (Act March 1, 1879) provides that no tax shall be collected on such spirits so destroyed, but it is insisted that notwithstanding that the plain-

tiffs in error are by law invested with the right thus conferred, that the court is powerless to afford a remedy. We cannot see our way clear to give our assent to this construction of the statute. * * *

* * * Were it not for the act of Congress authorizing the establishment of bonded warehouses, and the provision that the distiller should have eight years in which to pay the taxes on spirits duly deposited therein, as in this instance, the taxes would at once become due and payable. However, Congress has in its wisdom seen fit to afford this extension of time to distillers, and one who becomes surety under such circumstances sustains the same relation to the government that a surety would to an individual when he undertakes to answer for the default or miscarriage of another, and were it not for the provisions contained in section 3221 of the Revised Statutes (U. S. Comp. St. 1901, p. 2087) the surety would be liable for the full amount of the undertaking, notwithstanding any accident of casualty which might befall his principal in the meantime. The basis of the right of the government to recover against the surety depends upon its ability to show that it is entitled to recover the amount alleged to be due against the principal. The government has, in this instance, sought to collect the amount of taxes alleged to be due in a court of law, and in order to do so has instituted proceedings for that purpose. Under these circumstances it would be unprecedented to hold that, notwithstanding certain rights were conferred upon the distiller by the provisions of the statute, yet the surety, when sued on his joint

obligation with the distiller, should not be entitled to assert this right as a defense to the action instituted against him. In the case of the United States v. Bank of America (C.C.) 15 Fed. 730, among other things, it is said:

While under the revenue laws taxes are due the government by the distiller on distilled *spirits as soon as the same are produced, and there is ample machinery for collecting the same by warrant of distraint without the government being required to secure a judgment against the distiller*, yet this provision of the law only applies to the distiller in cases where the spirits *have not been placed in a bonded warehouse* as hereinbefore stated; but before the government can collect any taxes from the surety that might be due by the distiller it must first obtain a judgment against the distiller as well as the surety, and when an action is instituted for that purpose it necessarily raises an issue as to whether *the distiller is due the government anything*, and this issue must be determined in favor of the government before a judgment can be obtained against either."

NOTICES AND DEMAND FOR TAXES.

Moreover, a witness for appellee admitted (R. 76) that "there is no office copy of notices and demands for taxes"; also, that just the original copy is prepared; hence, it was error to admit in evidence any purported copy of such notice, there having been no prior demand, as required under California Code of Civil Procedure (Secs. 1855, 1937, 1938 et seq.) made upon appellants to produce the notice. (See Appellants' Opening Brief, page 37.)

THE LOSS RESULTED FROM A CASUALTY AND
NOT FROM NEGLIGENCE.

Appellants refer to paragraph III of their opening brief, pages 18-34 inclusive, wherein are set forth the authorities, relied upon by appellants, to the effect that revenue and tax statutes must be construed strictly as to the government and liberally in favor of taxpayers based upon language read in its ordinary and natural sense.

No admissible evidence was offered by appellee that was part of the *res gestae* (Appellants' Opening Brief, page 42) to establish that the alleged loss was occasioned by the negligence of the owner of the distilled spirits, rather than from a casualty, although the term "*casualty*" is used in several of the exhibits introduced in evidence and relied upon by appellee, indicating that appellee recognized the loss was due to a "*casualty*", rather than from any negligence of defendant owner.

In view of the decision in *Freeman v. United States*, supra, and the denial contained in the amended answer of defendants that they are indebted to appellee, the burden of proving that the loss was occasioned by the negligence of the owner was upon the appellee, rather than upon appellants. Had appellants instituted an action to abate or recover a tax assessed or paid, then the burden of proof would have been upon appellants, which is not the situation or rule of law in the instant case. (See: *Western Express Co. v. United States*, 141 F. 28; *Clifford v. Rothensies*, 46 F. Supp. 782.)

Appellee had the right to recover any taxes due by distraint, or to levy and assess the taxes based upon the quantity of distilling material used in the distillery (Title 26 U.S.C.A. Sec. 2641) but chose to follow the present course of procedure, thereby changing the order and burden of proof and placing the same squarely upon the shoulders of appellee, which burden of proof in view of the evidence, is clearly not sustained.

None of the cases cited in the reply brief for appellee are applicable to the present situation or the facts properly adduced from the evidence legally admitted, in that in such cases a "removal" of the distilled spirits from the distillery premises was established by the evidence or admitted. The evidence in this case is to the contrary. In *Rogan v. Conterno*, 132 F. (2d) 726, the distilled spirits had already been removed from the distillery and had been used in the fortification of wine so that an entirely different statute applied in relation thereto. In that case, the statute provided for the payment of the tax when the wine was *sold or removed for consumption or sale*. It was not necessary to remove the wine at all in order for the tax to become payable. Further the "consumption" by fire came within the provisions of the statute, whereas in this case, as no "removal" of the distilled spirits was established by the evidence, any tax which may have previously attached did not become due and payable until removal, which "*removal*" was not established; rather, was shown not to have occurred.

In the *Seagram* cases, cited by appellee on page 11 of their reply brief, there had not only been a removal from the distillery to the cistern room but there had also been a process of manufacture that had occurred after such removal, and the loss of spirits occurred when such manufactured product was being returned to the distillery.

There is set forth in the Appendix, *infra*, certain statutes which indicate clearly the intention of Congress in relation to the applicable statutes in the instant case and the decisions thereunder, wherein the Commissioner of Internal Revenue is authorized and required to abate any tax under regulations approved by the Secretary of the Treasury on the occasion of the loss of any distilled spirits so long as they are not stolen or destroyed and such loss did not result from leakage or evaporation while on the premises of a registered distillery during or after removal to a bonded government warehouse. The distilled spirits lost were intended to be used in the fortification of wine in the adjoining winery premises of defendant winery, and as the tax rate of 10 cents per gallon of distilled spirits would, upon such fortification, become applicable, rather than the rate of \$2.00 per gallon, it is apparent that a most inequitable result will occur by the imposition of a tax upon defendants at the higher, rather than the lower rate.

In order to support the conclusion of appellee that any loss of brandy resulted from negligence, and not from a casualty, (so as to impute the negligence of an

employee to a corporation), it is necessary to impute the *commission of a crime* to the owner, which imputation is not authorized under the statutes or decisions noted by appellee. (See Title 26 U.S.C.A. sec. 2818.)

CONCLUSION.

As appellee failed to sustain the burden of proof to establish the facts alleged in their complaint, denied and controverted by the pleadings and the evidence, and as reversible error has been committed, for the reasons and upon the grounds set forth in the opening brief for appellants, it is submitted that there was no evidence introduced or legally admitted, to support the findings and the judgment of the lower Court; hence, such judgment should be reversed with instructions to the lower Court to enter a judgment in favor of defendants in conformity with the evidence and the law applicable to the case.

Dated, San Francisco,

April 19, 1946.

Respectfully submitted,

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(Appendix Follows.)

Appendix

United States Code Annotated, Title 26.

SEC. 2816. Plan of distillery.

(a) Requirements. Except as provided in section 2824 (a) every distiller and person intending to engage in the business of a distiller shall, previous to the approval of his bond, cause to be made, under the direction of the collector of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch and every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe leads, or with which it communicates; also the number and location and cubic contents of every still, mash tub, and fermenting tub, the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this chapter. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery, and two copies shall be furnished to the collector of the district, one of which shall be kept by him, and the other transmitted to the Commissioner. The accuracy of every such plan and description shall be verified by the collector, the draftsman, and the distiller; *and no alteration shall be made in such distillery without the consent, in*

writing, of the collector. Any alteration so made shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the original, as the collector may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

SEC. 2818. Notice of manufacture of and permit to set up still.

(a) Requirement. Any person who manufactures any still, boiler, or other vessel to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify in writing the collector of the district in which such still, boiler, or other vessel is to be used or set up, by whom it is to be used, its capacity, and the time when the same is to be removed from the place of manufacture; and no such still, boiler, or other vessel shall be set up without the permit in writing of the said collector for that purpose; and

(b) Penalty for setting up still without permit. Any person who sets up any such still, boiler, or other vessel, without first obtaining a permit from the said collector of the district in which such still, boiler, or other vessel is intended to be used, or who fails to give such notice, shall pay in either case the sum of \$500.00, and shall forfeit the distilling apparatus thus removed or set up in violation of law.

SEC. 2846. Assessment for deficiencies in production and excess of material used.

(a) Power of commissioner. On the receipt of the distiller's return in each month, the Commissioner shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than 80 per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of tax imposed by law for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate imposed by law for every proof gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds 80 per centum of the producing capacity of the distillery. If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof gallon: *Provided*, That the actual product shall

be assumed to be in no case less than 80 per centum of the producing capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid.

SEC. 2901. Loss Allowances.

(b) Accidental fire or other casualty. The Secretary, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use while stored in the fortifying room on the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated. And when any distilled spirits are destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence

of the owner thereof, after the time when the same should have been drawn off by the storekeeper-gauger and placed in the internal revenue bonded warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified. When the owners of distilled spirits or grape brandy in the cases provided for by this section may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits or grape brandy before and without the tax being paid, the tax shall not be remitted to the extent of such insurance.

SEC. 3031. Tax on brandy or spirits used in fortification.

(a) Rate and application of tax. Under such regulations and official supervision and upon the giving of such notices and entries as the Commissioner, with the approval of the Secretary, may prescribe, any producer of wines defined under the provisions of this subchapter may withdraw from any fruit distillery or internal revenue bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made, and any producer of citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines may similarly withdraw citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, or apple brandy for the

fortification, respectively, of citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines, on the premises where actually made: *Provided*, That after June 26, 1936, there shall be levied and assessed against the producer of such wines or citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines (in lieu of the internal-revenue tax now imposed thereon by law) a tax of 10 cents per proof-gallon of grape brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy or wine spirits, whenever withdrawn and so used by him after such date in the fortification of such wines or citrus-fruit wines or peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines or apple wines during the preceding month, which assessment shall be paid by him within eighteen months from the date of notice thereof: *Provided*, That every producer of wine who withdraws such brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apple brandy, or wine spirits shall give bond to fully cover at all times prior to payment of the assessment the amount of tax due on such brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy, or wine spirits, which bond shall be in such form as the Commissioner, with the approval of the Secretary, shall, by regulations, prescribe. When such wines are

destroyed or sold or removed for the manufacture of vinegar, or the production of dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, the tax under this section as such grape brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy, or wine spirits shall, under such regulations as the Secretary may prescribe, be abated or refunded.

Nothing contained in this section shall be construed as exempting any wines, citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, apple wines, cordials, liqueurs, or similar compounds from the payment of any tax provided for in this subchapter.

Any such wines, or citrus-fruit wines, or peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, apple wines, may, under such regulations as the Secretary may prescribe, be sold or removed tax free for the manufacture of vinegar, or for the production of dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume.

The taxes imposed by this section shall not apply to dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume.

(b) Loss Allowances.

(1) Leakage, evaporation, etc. The Commissioner, under rules and regulations to be by him prescribed with the approval of the Secretary, upon the presen-

tation of proof to his satisfaction of the loss by leakage, evaporation, theft, or otherwise of brandy or fruit spirits, intended for the fortification of wine, from storage tanks in bonded warehouses or from steel drums filled therefrom while such drums are in such warehouse, and in the fortification room of a bonded winery, not occurring as the result of any negligence, connivance, collusion, or fraud on the part of the winemaker or his agents, is hereby authorized to remit or refund the taxes assessed or paid upon such lost brandy or fruit spirits: *Provided, however,* That such remission or refund shall be allowed only to the extent that the distiller or winemaker is not indemnified or recompensed for such loss.

SEC. 3032(a). Fortification of wines.

(a) Pure sweet wines. Any producer of pure sweet wines may use in the preparation of such sweet wines, under such regulations and after the filing of such notices and bonds, together with the keeping of such records and the rendition of such reports as to materials and products as the Commissioner, with the approval of the Secretary, may prescribe, wine spirits produced by any duly authorized distiller, and the Commissioner, in determining the liability of any distiller of wine spirits to assessment under Section 2846, is authorized to allow such distiller credit in his computations for the wine spirits withdrawn to be used in fortifying sweet wines under this chapter.

